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UNIVERSITY LIBRARY LAW COLLEGE

COMPARATIVE TABLE.

[1945]

I.L.R. (1945) MAD.		M.L.J.		
1	=	(1944)	2	25
10	=	,,	2	52
21	=	,,	1	197
24	=	,,	1	199
26	=	,,	1	269
35	=	,,	1	201
44	=	,,	1	288
47	=	,,	1	368
53	=	,,	1	285
61	=	,,	1	361
73	=	,,	1	281
76	=	,,	2	49
80	=	,,	2	192
96	=	,,	2	77
107	=	,,	2	85
119	=	,,	1	341
125	=	,,	1	303
129	=	,,	1	337
134	=	,,	1	340
138	=	,,	1	384
150	=	,,	2	37
157	=	,,	2	141
160	=	,,	2	164
165	=	,,	2	178
170	=	,,	1	419
174	=	,,	1	489
180	=	,,	1	391
184	=	,,	1	430
188	=	,,	1	427
194	=	,,	2	56
203	=	,,	1	381
211	=	,,	2	46
216	=	,,	2	67
231	=	,,	2	101
233	=	,,	2	150
237	=	,,	1	515
247	=	,,	2	317
250	=	,,	2	326
257	=	,,	2	2
263	=	,,	2	65
269	=	,,	2	74
276	=	,,	2	92
297	=	,,	2	146
304	=	,,	2	66
315	=	,,	2	152
317	=	(1945)	1	174
319	=	(1944)	2	393
323	=	,,	2	297
325	=	,,	2	286
328	=	,,	2	295
333	=	,,	2	128
338	=	,,	2	122
344	=	,,	2	153
348	=	,,	2	303
355	=	,,	2	131
378	=	,,	2	384
385	=	(1945)	1	155
389	=	,,	1	14
395	=	(1944)	2	325
398	=	,,	2	291
402	=	,,	2	262
407	=	,,	2	369
412	=	,,	2	231
420	=	(1945)	2	27

I.L.R. (1945) MAD.		M.L.J.		
450	=	(1944)	2	214
459	=	,,	2	157
461	=	,,	2	177
464	=	(1945)	1	106
468	=	,,	1	47
476	=	(1944)	2	365
482	=	,,	2	318
491	=	,,	2	371
500	=	(1945)	2	164
521	=	(1944)	2	225
525	=	,,	2	299
529	=	(1945)	1	180
535	=	,,	1	257
539	=	,,	1	69
541	=	,,	1	17
549	=	,,	1	149
553	=	,,	1	63
558	=	,,	1	7
562	=	(1944)	2	407
564	=	(1945)	1	54
566	=	,,	1	66
568	=	,,	1	60
571	=	,,	1	70
578	=	(1944)	2	374
584	=	,,	2	383
586	=	(1945)	1	58
590	=	,,	1	6
594	=	,,	1	241
597	=	,,	1	403
601	=	,,	1	229
610	=	,,	1	140
618	=	,,	1	175
623	=	,,	1	37
625	=	,,	1	196
628	=	,,	1	53
631	=	,,	1	55
634	=	,,	1	38
638	=	,,	2	337
672	=	,,	1	73
674	=	,,	1	163
679	=	,,	1	339
684	=	,,	1	270
693	=	,,	1	194
697	=	,,	1	372
710	=	,,	1	74
714	=	,,	1	151
720	=	,,	1	50
726	=	,,	1	57
728	=	,,	2	432
735	=	,,	1	243
742	=	,,	1	391
749	=	,,	2	435
758	=	,,	1	233
772	=	,,	1	173
775	=	,,	1	190
777	=	,,	1	191
781	=	,,	1	193
784	=	,,	1	265
789	=	,,	1	312
795	=	,,	1	281
803	=	,,	1	212
816	=	,,	1	320
821	=	,,	1	197

(1945) 1 M.L.J.		58 LAW WEEKLY.		1945 M.W.N.		I.L.R. (1945) MAD.
1	=	84	=	154	=	—
2	=	87 (1)	=	41 (1)	=	—
3	=	57—612	=	—	=	—
4	=	57—616	=	—	=	—
6	=	—	=	1944—709	=	590
7	=	57—614	=	1944—724 (2)	=	558
9	=	71	=	71	=	—
12 (P.C.)	=	3	=	353	=	—
14	=	7	=	1	=	389
17	=	5	=	137	=	541
20	=	89	=	172	=	—
22	=	87 (3)	=	179	=	—
24 (F.C.)	=	—	=	92	=	—
30 (F.C.)	=	—	=	135	=	—
31 (F.C.)	=	274	=	110	=	—
35 (F.C.)	=	273	=	113	=	—
37	=	87 (2)	=	162 (1)	=	623
38	=	36	=	162 (2)	=	634
39	=	—	=	195	=	—
42	=	—	=	—	=	—
44	=	—	=	295	=	—
47	=	25	=	80	=	468
50	=	303	=	3	=	720
53	=	21	=	97	=	628
54	=	10 (1)	=	164 (2)	=	564
55	=	13	=	98	=	631
56	=	34	=	155	=	—
57	=	14	=	1944—748	=	726
58	=	22	=	118	=	586
60	=	24	=	122	=	568
61	=	91	=	282	=	—
63	=	12	=	1944—726	=	553
65	=	—	=	—	=	—
66	=	10 (2)	=	164 (1)	=	566
67	=	—	=	—	=	—
69	=	36	=	156	=	539
70	=	43	=	132	=	571
73	=	—	=	200	=	672
74	=	41	=	171	=	710
76 (P.C.)	=	64	=	41 (2)	=	—
82 (P.C.)	=	—	=	29	=	—
86 (P.C.)	=	57	=	49	=	—
91 (P.C.)	=	47	=	140	=	—
97 (P.C.)	=	—	=	33	=	—
106	=	52	=	101	=	464
108 (F.C.)	=	—	=	57	=	—
134	=	305	=	289	=	—
136 (P.C.)	=	—	=	322	=	—
140	=	54	=	85	=	610
143	=	—	=	287	=	—
145	=	309	=	—	=	—
149	=	35	=	157	=	549
151	=	27	=	82	=	714
154	=	—	=	121	=	—
155	=	20	=	54	=	385
157	=	—	=	—	=	—
158	=	—	=	—	=	—
161	=	307	=	303	=	—
162	=	282	=	—	=	—
163	=	—	=	—	=	674
165	=	—	=	7	=	—
167	=	16	=	306	=	—
170	=	98	=	125	=	—
173	=	—	=	100	=	772
174	=	56	=	106 (2)	=	317
175	=	37	=	286	=	618
177	=	32 (1)	=	294 (1)	=	—
178	=	75 (2)	=	105	=	—
179	=	75 (1)	=	106 (1)	=	—
180	=	77	=	181	=	529
183	=	118	=	185 (2)	=	—

(1945) 1 M.L.J.	58 LAW WEEKLY.	1945 M.W.N.	I.L.R. (1945) MAD.
184	119	151	—
186	—	—	—
187	131	435	—
190	74	99	775
191	106	123	777
193	108 (1)	134	781
194	70	294 (2)	693
196	11	158	625
197	111	114	821
200	100 (2)	152	—
202	209	107	—
204	39	116	—
205	232	283 (1)	—
206	522	283 (2)	—
207	233	9	—
210	207	109	—
211	100 (1)	—	—
212	126	298	803
218	—	—	—
219	—	293	—
220	—	284	—
222	46	—	—
223	85	102	—
225 (P.C.)	228	201	—
229 (P.C.)	156	213	601
233	144	174	758
238	172	211	—
240	206	117	—
241	96	182	594
243	81	130	735
245	163	168	—
249 (P.C.)	—	252	—
253 (P.C.)	176	217	—
257 (P.C.)	191	139	535
258	139	209 (1)	—
259	—	291	—
261	—	304	—
263	140	475	—
265	108 (2)	160	784
267	235	474	—
268	—	—	—
269	167 (1)	233 (2)	—
270	153	197	684
273	138	184	—
274	—	185 (1)	—
275	181	244	—
278	170 (1)	270	—
279	236	314	—
281	135	325	795
284	174	334	—
287	238	280	—
288	189	240	—
291	170 (2)	228	—
292	150	206	—
296	167 (2)	227	—
298	169	209 (2)	—
299	239	336	—
300	287	358	—
302	95	360	—
303	272	104	—
305 (P.C.)	—	221	—
309 (P.C.)	226	193	—
312	148	191	789
314	189	205	—
315	184	234	—
317	298	230	—
320	—	—	816
322	40	120	—
323	121	311	—
326	79	278	—
328	160	309	—

(1945) 1 M.L.J.		58 LAW WEEKLY.		1945 M.W.N.	I.L.R. (1945)	MAD.
331	=	297	=	328	=	—
332	=	32 (2)	=	357	=	—
334	=	142	=	186	=	—
336	=	302	=	233 (1)	=	—
337	=	173	=	210	=	—
338	=	—	=	333	=	—
339	=	199	=	258	=	679
341	=	—	=	319 (2)	=	—
345	=	219	=	—	=	—
347	=	292 (2)	=	337	=	—
350	=	308	=	346 (2)	=	—
352	=	214	=	260	=	—
354	=	221	=	275	=	—
355	=	300	=	—	=	—
357	=	188	=	236	=	—
359 (F.C.)	=	—	=	146	=	—
365 (F.C.)	=	—	=	445	=	—
369 (F.C.)	=	313	=	428 (2)	=	—
371 (F.C.)	=	292 (1)	=	—	=	—
372	=	113	=	88	=	697
378	=	321	=	352	=	—
379	=	—	=	346 (1)	=	—
380	=	—	=	381	=	—
383	=	—	=	377	=	—
384	=	246	=	383	=	—
386	=	—	=	316	=	—
388	=	208	=	262	=	—
389	=	—	=	247	=	—
391	=	193	=	268	=	742
394	=	179	=	225	=	—
396	=	—	=	—	=	—
397 (P.C.)	=	281	=	532	=	—
399 (P.C.)	=	251	=	188	=	—
403	=	217	=	271	=	597
404	=	244 (1)	=	361 (1)	=	—
405	=	247	=	315	=	—
406	=	195	=	378	=	—
410 (P.C.)	=	—	=	—	=	—
414	=	278	=	343	=	—
417 (P.C.)	=	315	=	538	=	—
421	=	222	=	—	=	—
423	=	283	=	765	=	—
424	=	—	=	248	=	—
425	=	244 (2)	=	342	=	—
427	=	240	=	317	=	—
428	=	285	=	730 (2)	=	—
430	=	—	=	—	=	—
432	=	245	=	319	=	—
433	=	—	=	—	=	—
436	=	—	=	471	=	—
438	=	186	=	238	=	—
441	=	527	=	272	=	—
443	=	258	=	261	=	—
445	=	223	=	329	=	—
447	=	211	=	347	=	—
449	=	262	=	361 (2)	=	—
452	=	266	=	458	=	—
457	=	—	=	263	=	—
460	=	248	=	349	=	—
463	=	204	=	220	=	—
465	=	—	=	266	=	—
468	=	141	=	212	=	—
469	=	260	=	276	=	—
472	=	289	=	—	=	—
475	=	200	=	242	=	—
478	=	241	=	340	=	—
480	=	216	=	—	=	—

(1945) 2 M.L.J.		58 LAW WEEKLY		1945 M.W.N.		I.L.R. 1945 MAD.
1	=	203	=	237	=	—
2	=	—	=	476	=	—
7	=	102	=	480	=	—
11 (P.C.)	=	373	=	355	=	—
13	=	—	=	—	=	—
15	=	270	=	231	=	—
17	=	—	=	—	=	—
19	=	—	=	256	=	—
22	=	213	=	274	=	—
24	=	255	=	465	=	—
27	=	—	=	—	=	420
40 (P.C.)	=	343	=	366	=	—
46 (P.C.)	=	—	=	—	=	—
49	=	—	=	492	=	—
62	=	330	=	406	=	—
66	=	335	=	468	=	—
68	=	320	=	430	=	—
69	=	443	=	—	=	—
72	=	—	=	127	=	—
75 (P.C.)	=	—	=	—	=	—
78	=	324	=	405	=	—
80	=	446	=	421	=	—
86	=	325	=	470	=	—
87	=	318	=	417	=	—
88	=	319	=	427	=	—
89	=	354	=	410	=	—
93	=	322	=	454	=	—
95	=	337	=	428 (1)	=	—
96	=	334	=	464	=	—
98	=	350	=	456	=	—
100	=	509	=	525	=	—
109 (P.C.)	=	347	=	371	=	—
112	=	341	=	453	=	—
113	=	366	=	449	=	—
115	=	357	=	425	=	—
117	=	333	=	419	=	—
118	=	327	=	462	=	—
120	=	361	=	415	=	—
122	=	441	=	450	=	—
125	=	389	=	431	=	—
127	=	393	=	602	=	—
128	=	359	=	434	=	—
130	=	391	=	559	=	—
131	=	329	=	418	=	—
133	=	363	=	413	=	—
135	=	—	=	489	=	—
137	=	365	=	448	=	—
139	=	392	=	433	=	—
140	=	353	=	473	=	—
141 (P.C.)	=	394	=	594	=	—
144 (P.C.)	=	368	=	373	=	—
148	=	397	=	—	=	—
152	=	379 (2)	=	491	=	—
153	=	—	=	—	=	—
155	=	338	=	441	=	—
158	=	—	=	484	=	—
160 (P.C.)	=	375	=	541	=	—
164	=	657	=	—	=	500
172	=	379 (1)	=	438	=	—
173	=	383	=	—	=	—
176	=	390	=	483	=	—
177	=	380	=	485	=	—
180	=	385	=	508	=	—
182 (P.C.)	=	421	=	—	=	—
187	=	411	=	—	=	—
190	=	432	=	440	=	—
191	=	427	=	502	=	—
193	=	407	=	490	=	—
194	=	482	=	515	=	—
197	=	—	=	513	=	—
200	=	409	=	569	=	—
202	=	406	=	488	=	—

(1945) 2 M.L.J.		58 LAW WEEKLY.		1945 M.W.N.		I.L.R. (1945) MAD.
204	=	405	=	504	=	—
205	=	408	=	509	=	—
207	=	437	=	439	=	—
208	=	—	=	641	=	—
214	=	418	=	680	=	—
217	=	416	=	534	=	—
220	=	434	=	517	=	—
223 (P.C.)	=	485	=	523	=	—
224 (P.C.)	=	438	=	623	=	—
228	=	413	=	505	=	—
231 (P.C.)	=	454	=	520	=	—
235	=	429	=	557	=	—
237	=	430	=	511	=	—
239	=	492	=	578	=	—
244	=	433	=	—	=	—
245	=	—	=	606	=	—
249	=	491	=	556	=	—
250	=	497	=	603	=	—
253	=	46[illegible]	=	613	=	—
255	=	459	=	675	=	—
257 (P.C.)	=	571	=	661	=	—
259 (P.C.)	=	451	=	620	=	—
263	=	469	=	584	=	—
264	=	474	=	582	=	—
266	=	476	=	618	=	—
269	=	—	=	577	=	—
270 (F.C.)	=	—	=	385	=	—
295	=	470	=	571	=	—
297	=	—	=	—	=	—
303	=	479	=	648	=	—
305	=	457	=	545	=	—
307	=	486	=	614	=	—
312	=	478	=	601	=	—
314 (P.C.)	=	371	=	536	=	—
315	=	—	=	—	=	—
318	=	462	=	585	=	—
325 (P.C.)	=	—	=	546	=	—
337	=	534 (2)	=	—	=	638
349	=	—	=	633	=	—
351	=	—	=	655 (1)	=	—
352 (P.C.)	=	500	=	637	=	—
356 (P.C.)	=	—	=	564	=	—
362 (P.C.)	=	481	=	560 (1)	=	—
363	=	520	=	632	=	—
366	=	517	=	636	=	—
367 (P.C.)	=	504	=	573	=	—
371	=	518	=	646	=	—
374	=	531	=	709 (1)	=	—
375	=	545	=	656	=	—
380	=	—	=	666 (1)	=	—
381	=	559	=	662	=	—
382	=	550	=	666 (2)	=	—
384	=	562	=	673	=	—
387	=	534 (1)	=	655 (2)	=	—
388	=	532	=	654	=	—
389	=	529	=	651	=	—
393 (P.C.)	=	—	=	626	=	—
399	=	551	=	665	=	—
400	=	573	=	685	=	—
402	=	—	=	664	=	—
403	=	552	=	—	=	—
405	=	618	=	713	=	—
407	=	574	=	692	=	—
408	=	570	=	691	=	—
409	=	558	=	687	=	—
410	=	565 (1)	=	722 (1)	=	—
411	=	565 (2)	=	688	=	—
412	=	554	=	650	=	—
414	=	615	=	689	=	—
416	=	566	=	683	=	—
418	=	588	=	677	=	—
422	=	555	=	671	=	—

(1945) 2 M.L.J.		58 LAW WEEKLY.		1945 M.W.N.		I.L.R. (1945) MAD.
425	=	561	=	684	=	—
427	=	568	=	695	=	—
429	=	575	=	693	=	—
432	=	578	=	—	=	728
435	=	—	=	249	=	749
439	=	—	=	702	=	—
442	=	582	=	698	=	—
444	=	—	=	—	=	—
446 (P.C.)	=	62	=	47	=	—
448	=	592	=	667	=	—
453	=	584	=	700	=	—
455	=	586	=	730 (1)	=	—
456	=	581	=	714	=	—
458	=	—	=	—	=	—
460	=	—	=	—	=	—
461	=	613	=	720	=	—
463	=	587	=	704	=	—
464	=	628	=	—	=	—
468	=	605	=	697	=	—
469	=	603	=	724	=	—
471	=	601	=	712	=	—
473	=	—	=	716	=	—
478	=	604	=	—	=	—
479	=	625	=	722 (2)	=	—
482	=	610	=	706	=	—
484	=	650	=	735	=	—
486 (P.C.)	=	—	=	778	=	—
493 (P.C.)	=	—	=	—	=	—
496 (P.C.)	=	—	=	—	=	—
504	=	621	=	—	=	—
508	=	652	=	725	=	—
513	=	596	=	738	=	—
515	=	619	=	775 (1)	=	—
517	=	—	=	766	=	—
519 (P.C.)	=	—	=	592	=	—
521	=	642	=	—	=	—
522	=	644	=	—	=	—
525	=	—	=	—	=	—
531	=	—	=	740	=	—
535	=	632	=	754	=	—
536	=	631	=	764	=	—
537	=	637 (1)	=	771 (1)	=	—
538	=	—	=	768	=	—
539	=	640 (2)	=	770	=	—
541	=	640 (1)	=	—	=	—
542	=	612	=	707	=	—
544	=	598	=	709 (2)	=	—
546	=	637 (2)	=	771 (2)	=	—
547	=	—	=	732	=	—
550	=	647	=	755	=	—
553	=	641	=	769	=	—
555	=	—	=	783 (2)	=	—
556	=	643	=	774	=	—
557	=	—	=	772	=	—
559	=	—	=	775 (2)	=	—
563	=	—	=	—	=	—
564	=	—	=	—	=	—
565	=	638	=	748	=	—
567	=	634	=	761	=	—
571	=	—	=	—	=	—
573	=	—	=	—	=	—
574	=	—	=	—	=	—
575	=	—	=	—	=	—
576	=	—	=	—	=	—
577	=	—	=	783 (1)	=	—
578	=	461	=	610	=	—
582	=	—	=	—	=	—
585	=	—	=	—	=	—

58 L.W.		M.L.J.		
1 (P.C.)	=	(1944)	2	348
3 (P.C.)	=	(1945)	1	12
5	=	,,	1	17
7	=	,,	1	14
10 (1)	=	,,	1	54
10 (2)	=	,,	1	66
11	=	,,	1	196
12	=	,,	1	63
14	=	,,	1	57
15	=	,,	1	55
16	=	,,	1	167
20	=	,,	1	155
21	=	,,	1	53
22	=	,,	1	58
24	=	,,	1	60
25 (P.C.)	=	,,	1	47
27	=	,,	1	151
30	=	,,	1	38
32 (1)	=	,,	1	177
32 (2)	=	,,	1	332
34	=	,,	1	56
35	=	,,	1	149
36	=	,,	1	69
37	=	,,	1	175
39	=	,,	1	204
40	=	,,	1	322
41	=	,,	1	74
43	=	,,	1	70
46	=	,,	1	222
47 (P.C.)	=	,,	1	91
52	=	,,	1	106
54	=	,,	1	140
56	=	,,	1	174
57 (P.C.)	=	,,	1	86
62 (P.C.)	=	,,	2	446
64 (P.C.)	=	,,	1	76
70	=	,,	1	194
71	=	,,	1	9
74	=	,,	1	190
75 (1)	=	,,	1	179
75 (2)	=	,,	1	178
77	=	,,	1	180
79	=	,,	1	326
81	=	,,	1	243
84	=	,,	1	1
85	=	,,	1	223
87 (1)	=	,,	1	2
87 (2)	=	,,	1	37
87 (3)	=	,,	1	22
89	=	,,	1	20
91	=	,,	1	61
92	=	(1944)	2	371
95	=	(1945)	1	302
96	=	,,	1	241
98	=	,,	1	170
100 (1)	=	,,	1	211
100 (2)	=	,,	1	200
102	=	,,	2	7
106	=	,,	1	191
108 (1)	=	,,	1	193
108 (2)	=	,,	1	265
111	=	,,	1	197
113	=	,,	1	372
118	=	,,	1	183
119	=	,,	1	184
121	=	,,	1	323
124				
126	=	,,	1	212
131	=	,,	1	187
135	=	,,	1	281
138	=	,,	1	273
139	=	,,	1	258
140	=	(1945)	1	263
141	=	,,	1	468
142	=	,,	1	334
144	=	,,	1	233
148	=	,,	1	312
150	=	,,	1	292
153	=	,,	1	270
156 (P.C.)	=	,,	1	229
160	=	,,	1	328
163	=	,,	1	245
167 (1)	=	,,	1	269
167 (2)	=	,,	1	296
169	=	,,	1	298
170 (1)	=	,,	1	278
170 (2)	=	,,	1	291
172	=	,,	1	238
173	=	,,	1	337
174	=	,,	1	284
176 (P.C.)	=	,,	1	253
179	=	,,	1	394
181	=	,,	1	275
183	=	,,	1	314
184	=	,,	1	315
186	=	,,	1	438
188	=	,,	1	357
189	=	,,	1	288
191 (P.C.)	=	,,	1	257
193	=	,,	1	391
195	=	,,	1	406
199	=	,,	1	339
200	=	,,	1	475
203	=	,,	2	1
204	=	,,	1	463
206	=	,,	1	240
207	=	,,	1	210
208	=	,,	1	388
209	=	,,	1	202
211	=	,,	1	447
213	=	,,	2	22
214	=	,,	1	352
216	=	,,	1	480
217	=	,,	1	403
219	=	,,	1	345
221	=	,,	1	354
222	=	,,	1	421
223	=	,,	1	445
226	=	,,	1	309
228	=	,,	1	225
232	=	,,	1	205
233	=	,,	1	207
235	=	,,	1	267
236	=	,,	1	279
238	=	,,	1	287
239	=	,,	1	299
240	=	,,	1	427
241	=	,,	1	478
244 (1)	=	,,	1	404
244 (2)	=	,,	1	425
245	=	,,	1	432
246	=	,,	1	384
247	=	,,	1	405
248	=	,,	1	460
251	=	,,	1	399
255	=	,,	2	24
258	=	,,	1	443
260	=	,,	1	469
262	=	,,	1	449
266	=	,,	1	452
270	=	,,	2	15
272	=	,,	1	303
273	=	,,	1	35
274	=	,,	1	31

58 L.W.		M.L.J.		
278	=	(1945)	1	414
281	=	,,	1	397
282	=	,,	1	162
283	=	,,	1	423
285	=	,,	1	428
287	=	,,	1	300
289	=	,,	1	472
292 (1)	=	,,	1	371
292 (2)	=	,,	1	347
295	=	..		
297	=	(1945)	1	331
298	=	,,	1	317
300	=	,,	1	355
302	=	,,	1	336
303	=	,,	1	50
305	=	,,	1	134
307	=	,,	1	161
308	=	,,	1	350
309	=	,,	1	145
313	=	,,	1	369
315	=	,,	1	417
318	=	,,	2	87
319	=	,,	2	88
320	=	,,	2	68
321	=	,,	1	378
322	=	,,	2	93
324	=	,,	2	78
325	=	,,	2	86
327	=	,,	2	118
329	=	,,	2	131
330	=	,,	2	62
333	=	,,	2	117
334	=	,,	2	96
335	=	,,	2	66
337	=	,,	2	95
338	=	,,	2	155
341	=	,,	2	112
343	=	,,	2	40
347	=	,,	2	109
350	=	,,	2	98
353	=	,,	2	140
354	=	,,	2	89
357	=	,,	2	115
359	=	,,	2	128
361	=	,,	2	120
363	=	,,	2	133
365	=	,,	2	137
366	=	,,	2	113
368	=	,,	2	144
371	=	,,	2	314
373	=	,,	2	11
375	=	,,	2	160
379 (1)	=	,,	2	172
379 (2)	=	,,	2	152
380	=	,,	2	177
383	=	,,	2	173
385	=	,,	2	180
386	=	,,	1	478
389	=	,,	2	125
390	=	,,	2	176
391	=	,,	2	130
392	=	,,	2	139
393	=	,,	2	127
394	=	,,	2	141
397	=	,,	2	148
401 (P.C.)	=	,,	2	578
405	=	,,	2	204
406	=	,,	2	202
407	=	,,	2	193
408	=	,,	2	205
409	=	,,	2	200

58 L.W.		M.L.J.		
411	=	(1945)	2	187
413	=	,,	2	228
416	=	,,	2	217
418	=	,,	2	214
421	=	,,	2	182
427	=	,,	2	191
429	=	,,	2	235
431	=	,,	2	237
432	=	,,	2	190
433	=	,,	2	244
434	=	,,	2	220
437	=	,,	2	207
438	=	,,	2	224
441	=	,,	2	122
443	=	,,	2	69
446	=	,,	2	80
451	=	,,	2	259
454	=	,,	2	231
457	=	,,	2	305
459	=	,,	2	255
461	=	,,	2	253
462	=	,,	2	318
469	=	,,	2	263
470	=	,,	2	295
472	=	,,	2	269
474	=	,,	2	264
476	=	,,	2	266
478	=	,,	2	312
479	=	,,	2	303
481	=	,,	2	362
482	=	,,	2	194
485	=	,,	2	223
486	=	,,	2	307
491	=	,,	2	249
492	=	,,	2	239
496	=	,,	2	250
500	=	,,	2	352
504	=	,,	2	367
509	=	,,	2	100
517	=	,,	2	366
518	=	,,	2	371
520	=	,,	2	363
522	=	,,	1	206
523 (P.C.)	=	..		
527	=	,,	1	441
529	=	,,	2	389
531	=	,,	2	374
532	=	,,	2	388
534 (1)	=	,,	2	387
534 (2)	=	,,	2	337
545	=	,,	2	375
550	=	,,	2	385
551	=	,,	2	399
552	=	,,	2	403
554	=	,,	2	412
556	=	,,	2	422
558	=	,,	2	409
561	=	,,	2	425
562	=	,,	2	384
565 (1)	=	,,	2	410
565 (2)	=	,,	2	411
566	=	,,	2	416
568	=	,,	2	427
570	=	,,	2	408
571	=	,,	2	257
573	=	,,	2	400
574	=	,,	2	407
575	=	,,	2	429
578	=	,,	2	432
581	=	,,	2	456
582	=	,,	2	442

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58 L.W.		M.L.J.		
584	=	(1945)	2	453
586	=	,,	2	455
587	=	,,	2	463
588	=	,,	2	418
592	=	,,	2	448
596	=	,,	2	513
598	=	,,	2	544
601	=	,,	2	471
603	=	,,	2	469
604	=	,,	2	478
605	=	,,	2	468
606	=	(1944)	2	395
611	=	(1945)	2	482
612	=	,,	2	542
613	=	,,	2	461
615	=	,,	2	414
618	=	,,	2	405
619	=	,,	2	515
620	=	,,	2	517
621	=	(1945)	2	504
625	=	,,	2	479
628	=	,,	2	464
631	=	,,	2	536
632	=	,,	2	535
634	=	,,	2	567
637 (1)	=	,,	2	537
637 (2)	=	,,	2	546
638	=	,,	2	565
640 (1)	=	,,	2	541
640 (2)	=	,,	2	539
641	=	,,	2	553
642	=	,,	2	521
643	=	,,	2	556
644	=	,,	2	522
647	=	,,	2	550
650	=	,,	2	484
652	=	,,	2	508
657	=	,,	2	164

1945 M.W.N.		M.L.J.		
1	=	(1945)	1	14
3	=	,,	1	50
5	=	(1944)	2	374
7	=	(1945)	1	165
9	=	,,	1	207
11	=	(1944)	2	393
12	=	,,	2	295
14	=	,,	2	365
16	=	,,	2	258
17	=	,,	2	250
19	=	,,	2	1
20	=	,,	2	338
22	=	,,	2	266
23 (1)	=	,,	2	261
23 (2)	=	,,	2	202
26	=	,,	2	199
27	=	,,	2	35
29	=	(1945)	1	82
33	=	,,	1	97
41 (1)	=	,,	2	2
41 (2)	=	,,	1	76
47	=	,,	2	446
49	=	,,	1	86
54	=	,,	1	155
55	=	(1944)	2	391
56	=	,,	2	408
57	=	(1945)	1	108
80	=	,,	1	47
82	=	,,	1	151
85	=	,,	1	140
88	=	,,	1	372
92	=	,,	1	24
97	=	,,	1	53
98	=	,,	1	55
99	=	,,	1	190
100	=	,,	1	173
101	=	,,	1	105
102	=	,,	1	223
104	=	,,	1	303
105	=	,,	1	178
106 (1)	=	,,	1	179
106 (2)	=	,,	1	174
107	=	,,	1	202
109	=	,,	1	210
110	=	,,	1	31
113	=	,,	1	35
114	=	,,	1	197
116	=	,,	1	204
117	=	,,	1	240
118	=	(1945)	1	58
120	=	,,	1	322
121	=	,,	1	154
122	=	,,	1	60
123	=	,,	1	191
125	=	,,	1	170
127	=	,,	2	72
130	=	,,	1	243
132	=	,,	1	70
134	=	,,	1	193
135	=	,,	1	30
137	=	,,	1	17
139	=	,,	1	257
140	=	,,	1	91
146	=	,,	1	359
151	=	,,	1	184
152	=	,,	1	200
154	=	,,	1	1
155	=	,,	1	56
156	=	,,	1	69
157	=	,,	1	149
158	=	,,	1	196
160	=	,,	1	265
162 (1)	=	,,	1	37
162 (2)	=	,,	1	38
164 (1)	=	,,	1	66
164 (2)	=	,,	1	54
165	=	,,	1	9
168	=	,,	1	245
171	=	,,	1	74
172	=	,,	1	20
174	=	,,	1	233
179	=	,,	1	22
181	=	,,	1	180
184	=	,,	1	273
185 (1)	=	,,	1	274
185 (2)	=	,,	1	183
186	=	,,	1	334
188	=	,,	1	399
191	=	,,	1	312
193	=	,,	1	309
195	=	,,	1	39
197	=	,,	1	270
200	=	,,	1	73
201	=	,,	1	225
205	=	,,	1	314
206	=	,,	1	292
209 (1)	=	,,	1	258
209 (2)	=	,,	1	298

1945 M.W.N.		M.L.J.		
210	=	(1945)	1	337
211	=	,,	1	238
212	=	,,	1	468
213	=	,,	1	229
217	=	,,	1	253
220	=	,,	1	463
221	=	,,	1	305
225	=	,,	1	394
227	=	,,	1	296
228	=	,,	1	291
230	=	,,	1	317
231	=	,,	2	15
233 (1)	=	,,	1	336
233 (2)	=	,,	1	269
234	=	,,	1	315
236	=	,,	1	357
237	=	,,	2	[illegible]
238	=	,,	1	438
240	=	,,	1	288[illegible]
242	=	,,	1	475
244	=	,,	1	275
247	=	,,	1	[illegible]89
248	=	,,	1	42[illegible]
249	=	,,	2	435
252	=	,,	1	249
256	=	,,	2	19
258	=	,,	1	339
260	=	,,	1	352
261	=	,,	1	443
262	=	,,	1	388
263	=	,,	1	457
266	=	,,	1	465
268	=	,,	1	391
270	=	,,	1	278
271	=	,,	1	403
272	=	,,	1	441
274	=	,,	2	22
275	=	,,	1	354
276	=	,,	1	469
278	=	,,	1	326
280	=	,,	1	287
282	=	,,	1	61
283 (1)	=	,,	1	205
283 (2)	=	,,	1	206
284	=	,,	1	220
286	=	,,	1	175
287	=	,,	1	143
289	=	,,	1	134
291	=	,,	1	259
293	=	,,	1	219
294 (1)	=	,,	1	177
294 (2)	=	,,	1	194
295	=	,,	1	44
298	=	,,	1	212
303	=	,,	1	161
304	=	,,	1	261
306	=	,,	1	167
309	=	,,	1	328
311	=	,,	1	32[illegible]
314	=	,,	1	279
315	=	,,	1	405
316	=	,,	1	386
317	=	,,	1	[illegible]27
319 (1)	=	,,	1	432
319 (2)	=	,,	1	341
322	=	,,	1	136
325	=	,,	1	281
328	=	,,	1	331
329	=	,,	1	445
331	=		..	
333	=	(1945)	1	338

1945 M.W.N.		M.L.J.		
334	=	(1945)	1	284
336	=	,,	1	299
337	=	,,	1	347
340	=	,,	1	478
342	=	,,	1	425
343	=	,,	1	414
346 (1)	=	,,	1	379
346 (2)	=	,,	1	350
347	=	,,	1	447
349	=	,,	1	460
352	=	,,	1	378
353	=	,,	1	12
355	=	,,	2	11
357	=	,,	1	332
358	=	,,	1	300
360	=	,,	1	302
361 (1)	=	,,	1	404
361 (2)	=	,,	1	449
366	=	,,	2	40
371	=	,,	2	109
373	=	,,	2	144
37[illegible]	=	,,	1	383
378	=	,,	1	406
381	=	,,	1	380
383	=	,,	1	385
385	=	,,	2	270
405	=	,,	2	78
406	=	,,	2	62
410	=	,,	2	89
413	=	,,	2	133
415	=	,,	2	120
417	=	,,	2	87
418	=	,,	2	131
419	=	,,	2	117
421	=	,,	2	80
425	=	,,	2	115
427	=	,,	2	88
428 (1)	=	,,	2	95
428 (2)	=	,,	1	369
430	=	,,	2	68
431	=	,,	2	125
433	=	,,	2	139
434	=	,,	2	128
435	=	,,	1	187
438	=	,,	2	172
439	=	,,	2	207
440	=	,,	2	190
441	=	,,	2	155
445	=	,,	1	365
448	=	,,	2	133
449	=	,,	2	[illegible]7
450	=	,,	2	122
453	=	,,	2	112
454	=	,,	2	93
456	=	,,	2	98
458	=	,,	1	452
462	=	,,	2	118
464	=	,,	2	96
465	=	,,	2	24
468	=	,,	2	66
470	=	,,	2	86
471	=	,,	1	436
473	=	,,	2	140
474	=	,,	1	267
475	=	,,	1	263
476	=	,,	2	2
480	=	,,	2	7
483	=	,,	2	176
484	=	,,	2	158
485	=	,,	2	177
488	=	,,	2	202

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1945 M.W.N.		M.L.J.		
489	=	(1945)	2	135
490	=	,,	2	193
491	=	,,	2	152
492	=	,,	2	49
502	=	,,	2	191
504	=	,,	2	204
505	=	,,	2	228
508	=	,,	2	180
509	=	,,	2	205
511	=	,,	2	237
513	=	,,	2	197
515	=	,,	2	194
517	=	,,	2	220
520	=	,,	2	231
523	=	,,	2	223
525	=	,,	2	100
532	=	,,	1	397
534	=	,,	2	217
536	=	,,	2	314
538	=	,,	1	417
541	=	,,	2	160
545	=	,,	2	305
546	=	,,	2	325
556	=	,,	2	249
557	=	,,	2	235
559	=	,,	2	130
560 (1)	=	,,	2	362
560 (2) (P.C.)	=	..		
564	=	(1945)	2	356
569	=	,,	2	200
571	=	,,	2	295
573	=	,,	2	367
577	=	,,	2	269
578	=	,,	2	239
582	=	,,	2	264
584	=	,,	2	263
585	=	,,	2	318
592	=	,,	2	519
594	=	,,	2	141
596 (P.C.)	=	..		
601	=	(1945)	2	312
602	=	,,	2	127
603	=	,,	2	250
606	=	,,	2	245
610 (P.C.)	=	,,	2	578
613	=	,,	2	253
614	=	,,	2	307
618	=	,,	2	266
620	=	,,	2	259
623	=	,,	2	224
626	=	,,	2	393
632	=	,,	2	263
633	=	,,	2	349
634 (P.C.)	=	..		
636	=	(1945)	2	366
637	=	,,	2	352
641	=	,,	2	208
646	=	,,	2	371
648	=	,,	2	303
650	=	,,	2	412
651	=	,,	2	389
654	=	,,	2	388
655 (1)	=	,,	2	351
655 (2)	=	,,	2	387
656	=	,,	2	375
661	=	,,	2	257

1945 M.W.N.		M.L.J.		
662	=	(1945)	2	381
664	=	,,	2	402
665	=	,,	2	399
666 (1)	=	,,	2	380
666 (2)	=	,,	2	383
667	=	,,	2	448
671	=	,,	2	422
673	=	,,	2	384
675	=	,,	2	255
677	=	,,	2	418
680	=	,,	2	214
683	=	,,	2	416
684	=	,,	2	425
685	=	,,	2	400
687	=	,,	2	409
688	=	,,	2	411
689	=	,,	2	414
691	=	,,	2	408
692 (1)	=	,,	2	407
692 (2)	=	,,	2	429
695	=	,,	2	427
697	=	,,	2	468
698	=	,,	2	442
700	=	,,	2	453
702	=	,,	2	439
704	=	,,	2	463
706	=	,,	2	482
707	=	,,	2	542
709 (1)	=	,,	2	374
709 (2)	=	,,	2	544
712	=	,,	2	471
713	=	,,	2	405
714	=	,,	2	456
722 (1)	=	,,	2	410
722 (2)	=	,,	2	479
724	=	,,	2	469
725	=	,,	2	508
730 (1)	=	,,	2	455
730 (2)	=	,,	1	428
732	=	,,	2	547
735	=	,,	2	484
737	=	,,	2	478
738	=	,,	2	513
740	=	,,	2	531
743	=	,,	2	403
745	=	,,	1	472
748	=	,,	2	565
749	=	,,	2	504
753	=	,,	2	153
754	=	,,	2	535
755	=	,,	2	550
758	=	,,	2	464
761	=	,,	2	567
764	=	,,	2	536
765	=	,,	1	423
766	=	,,	2	517
768	=	,,	2	538
769	=	,,	2	553
770	=	,,	2	539
771 (1)	=	,,	2	537
771 (2)	=	,,	2	546
772	=	,,	2	557
774	=	,,	2	556
775 (1)	=	,,	2	515
775 (2)	=	,,	2	559

THE

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PROFESSIONAL CONDUCT AND ADVOCACY*.

This book grew out of a course of Lectures delivered to apprentices-at-law under the auspices of the Bar Council in the year 1940. Though the main scheme of the Lectures has been retained, this second edition of the book has been thoroughly revised and substantially enlarged. In its present form the book is certain to become a classic on the subject at least so far as India is concerned. Mr. Krishnaswami Aiyar, the learned author, has been one of the leading members of the Madras Bar. Further, he has lived among the giants and he belongs to a generation of outstanding personalities at the Madras Bar. Consequently, though he has drawn largely and rightly from well-known books relating to the British Bar and its traditions, he has also extensively drawn from his own experience and intimate knowledge of the world of the law with its trinity,—the client, the Advocate and the Judge. The book impresses in a very convincing and interesting way on the reader, whether he be an Apprentice or an Advocate newly enrolled or even an Advocate of some years' standing, the high standards which have to be maintained by members of the Legal Profession. The great value of the book lies in its practical approach to the concrete questions which are bound to arise in the daily life of an Advocate. It is often forgotten that virtue consists in a bundle of negatives. It is not sufficient to tell the novice to keep up high standards. It should be made clear to him what he ought not to do more than what he ought to do. This book does that in an eminent degree in its successive chapters dealing with professional life in its different aspects, *e.g.*, meeting clients, preparation of a case, conduct in Court, duty to the profession, to the Court, to the client, to the opponent and to the State. If one looks up the index to the book (which by the way is exceptionally informing) one will discover the staggering number of things which the lawyer should *not* do.

In spite of protestations now and then from a few leaders, it must be confessed that generally the high nature of the calling of a lawyer is not adequately realised. It is high time that lawyers recognised that it is their duty to be the "custodians of civilisation" and to take their part in the political and public life of the country as well as in the administration of justice. This topic is prominently dealt with in two Chapters (I and XVIII).

The author does not content himself with being merely admonitory. He has very helpful suggestions to make to the Bar as well as to the Bench. Appendix I to the book entitled "The Judge" is very thoughtful and useful. There is a great deal to be said in favour of the learned author's comment on the increasing tendency in Court to be content with the citation of a decided case for a mere precedent without any attempt to examine its underlying principles.

*Lectures delivered by Rao Bahadur K. V. Krishnaswami Aiyar to the apprentices at-law at the instance of the Madras Bar Council, 2nd Edition, 1945. Publishers: The Oxford University Press.

Likewise, his observations on some of the problems facing the future of the lawyer consequent on overcrowding and competition (Chapter XVIII) are well worth examination at the hands of the Bar Council and of the leaders of the profession. It is not possible to agree with Sir Maurice Gwyer when he appears to suggest in his foreword that useful purpose will be served if the standards of law examination are raised further. The truth is not that lawyers at present are ill-equipped but there is not enough work for the ever increasing number of Advocates year by year. On this subject the remarks and suggestions made by the learned author are far more direct and helpful. The idea of partnerships among lawyers in particular merits serious consideration.

The author is quite alive to the fact that in the future, more or less immediate, the lawyer stands in need of equipment not only in matters strictly legalistic but also in other branches of knowledge. Likewise he foresees the opportunities which the lawyer is likely to have to extend his sphere of activity by taking part in the proceedings before the numerous administrative and quasi-judicial tribunals which are bound to come into existence. The following extract from one of the addresses at the recent proceedings of the Canadian Bar Association is worth pondering:

"Upon any view, realistic or liberal, the Bar must recognize that both for the practice of law and for leadership in citizenship in the new world the profession must be educated more widely and more deeply. Thus far the profession in Canada has exercised its controlling influence largely in the direction of a vocational training with constant emphasis on the "practical" subjects and with little patience for historical, comparative or cultural subjects. Such an attitude and such an education simply will not do, in a day when government is intervening in all spheres of human relations, and when new ideas of the function of law are emerging. It will not do for a day when the workaday lawyer's narrow round is giving way to activities requiring knowledge of social, scientific and economic forces. Still less will it do for the lawyer called, as so many are, to the aid and direction of great movements.

"The complexity and diversity of the matters now involved in the discharge of a lawyer's duties are such as to require that he have the widest possible understanding of all phases of social life and the utmost catholicity of interests. . ."

The printing and get up of the book are superb. Every one will endorse Sir Maurice in saying that this is "a book which should be in the hands of every law student and young practitioner; and many older practitioners would derive much benefit from studying its pages".

P. V. Rajamannar.

Section 12, Indian Limitation Act and Appeals Under the Letters Patent, (Appellate Side).

By

R. S. Srinivasacharya, Advocate, Madras.

Does section 12 of the Limitation Act apply to appeals under the Letters Patent, taken from the Appellate Side of the High Court? The answer has been given in the negative by all the Indian High Courts which have dealt with the matter except Madras which has given only one decision in the matter and has, in that decision, given the answer in the affirmative. It is submitted, with respect, that the view of the other High Courts is clearly correct.

The relevant provisions of law are only two. Rule 51 of the Appellate Side Rules (Madras) provides a period of 30 days for appeal. Order XLI-B (Madras) of the Civil Procedure Code, declares in rule 1 that it "shall not be necessary to file . . . copies of the judgment and decree". In passing, the striking contrast afforded by the rule on the Original Side with respect to appeals therefrom may be referred to, Order 27, rule 1 (O.S. Rules).

From very early times, the High Courts with rules similar to the Madras rule have consistently been holding that section 12 of the Limitation Act or its corres-

ponding provision cannot be applied to such appeals. The earliest case is from Allahabad and of the year 1880; a Bench of four Judges considered the matter to be so plain that, while giving the negative answer, they considered it unnecessary to give any reasons. *Fazal Muhammad* v. *Phul Kuar*[1]. This decision was applied in *Naubat Ram* v. *Haram Das*[2] and followed in *Dyal Singh* v. *Budha Singh*[3], *Fatteh Muhammad* v. *Chothu Ram*[4], *Jog Dhian* v. *Hussain*[5], and *Mukund Mahto* v. *Niranjan Chakravarty*[6].

The contrary view is to be found in a decision of Madras of 1923. The decision appears to have been given *ex-parte* and does not appear to have been fully reported, short notes of the decision, alone, being available.[7] Two reasons are given for the decision: (1) the language of clause 44 of the Madras Letters Patent, (2) the amendment of sction 29 of the Limitation Act made in 1922, making certain sections of the Act of which section 12 is one applicable to cases provided for by "special or local law".

With respect, the first of the reasons given does not have much force; clause 44 of the Letters Patent has been, throughout, substantially in its extant form and no one had ever thought that its presence could affect the position, one way or the other. The second ground looks more plausible, but, is equally, unacceptable. It has been considered by the Patna High Court in the 1934 case referred to *supra*, where the dictum of Cunliffe, J., of Rangoon, occurring at p. 395 of *Ganny* v. *Russall*[8], has been followed and in *Jog Dhian* v. *Hussain*[5], which followed the Patna ruling. As observed by Cunliffe, J., the term "special law" can be properly applied only to provisions enacted by legislative authority, and rules framed by High Courts under the Letters Patent can hardly, without doing violence to language, be said to attract section 29 of the Limitation Act. *Cf.* description in Hailsham of the grant of Letters Patent as a matter of "the King's Grace". (Vol. 24, Para. 529).

The point requires little elaboration, but, nevertheless, may be briefly considered. There are two possible points of view. One and, perhaps, the easier is to regard rule 51 as enacting a "condition precedent", absolute and exacting in its incidence as was held in relation to sec. 9 (1) of the Provincial Insolvency Act:—*Chenchuramana* v. *Arunachalam*[9], and, *not* as prescribing a "period of limitation" liable to be affected by other provisions of the Act.

But, a better and more satisfactory method of approach is to express concurrence with the view long adumbrated in India that the provisions of the Limitation Act do not, *proprio vigore*, apply to periods of limitation other than those provided for in the First Schedule of the Limitation Act itself. It is in that view, that so early as in the year 1876, the Bombay High Court refused to apply that Act to the case before it which was a claim made by an Attorney of the Court, the matter having been provided for, not by the Act, but, by Rules of the Court. This was in *Abba Haji Ismail* v. *Abba Thara*[10], it was followed in *Wadia Gandhy & Co.* v. *Purushotam Sivji*[11], and *Lakhimani Dassi* v. *Dwijendra Nath Mukerjee*[12], the Allahabad High Court refused to apply section 5 of the Limitation Act to an appeal filed under the Letters Patent, but, filed beyond the period mentioned in the appropriate rule, *Baijnath* v. *Dulari Hajjam*[13]. And in the same year, the Judicial Committee, while applying section 12 of the Act to an Original Side Appeal of the Rangoon High Court, observed that the case of *Fazal Muhammad* v. *Phul Kuar*[14], was different, because the case was one provided for by a rule under the Letters Patent and *not by any*

1. (1879) I.L.R. 2 All. 192 (F.B.).
2. (1886) I.L.R. 9 All. 115 at 118 (F.B.).
3. (1921) I.L.R. 2 Lah. 127.
4. A.I.R. 1921 Lah. 237.
5. (1935) I.L.R. 16 Lah. 448 (F.B.).
6. A.I.R. 1934 Pat. 353.
7. 44 M.L.J.S.N. p. 15.
8. (1930) 8 Rang. 380 at p. 395.
9. (1935) I.L.R. 58 Mad. 794 (F.B.).
10. (1876) I.L.R. 1 Bom. 253.
11. (1907) I.L.R. 32 Bom. 1.
12. (1918) I.L.R. 46 Cal. 249.
13. (1928) I.L.R. 50 All. 866.
14. (1879) I.L.R. 2 All. 192 (F.B.).

Article as was the case before them by the Limitation Act. The inevitable inference follows, *viz.*, that the provisions of the Indian Limitation Act apply only to cases provided for by that Act, itself, and not to cases provided for, elsewhere, *e.g.*, by rules under the Letters Patent. It is in the same view that the Madras High Court has framed special rules applying section 5 of the Limitation Act to cases falling under Order 9, rule 13, and is proposing a similar application to cases coming under Order 41, rule 21 of the Code.

It has only to be added that the 16 Lah. case and the Patna case referred to *supra* were later than the amendment of section 29 of the Limitation Act made in 1922 and clearly decided that that amendment in no way affected the position established in *Fazal Muhammad* v. *Phul Kuar*.

The point arose pointedly, in Madras, in a recent appeal under the Letters Patent, but, was, unfortunately, left undecided. It is hoped that when the point next arises, Madras would fall into line with the other High Courts.

Gotra and Pravara Names.

By

R. S. Sankara Aiyar, Retired District and Sessions Judge.

The Draft Hindu Code section 5 (*f*) says that Gotra and Pravara have the same meaning as in the Hindu Law. It is commonly understood that Gotra name gives the name of the original parent, or male founder of the family. Pravara names are similarly understood to be the names of illustrious descendents. When a man announces himself before a Guru, he says: "I am of such gotra with such and such pravara and I am called by such and such name".

On the surface it looks very simple and free from possibility of confusion. But when the details regarding Gotra origin and Pravara names are examined, a most baffling situation is found. The matter is here presented on the basis of the authority followed in South India, the Vaidyanatha Deekshitheeyam.

In practice it assumes that all families of whatever subcaste professing the same gotra, must be agnatic descendants of a first father bearing the gotra name. In other words it is taken for granted that no two or more individuals ever existed with the same name, so far as gotra rishis and pravara rishis are concerned.

The provision in the clause about same gotra, *or* same pravara seems to grant that same gotra can have different pravaras, and, same pravara relate to different gotras. As a fact such is the case in a few instances as will be shown later on. But the main questions are (1) "Were there not many gotra rishis and pravara rishis with the same name" (2) if there were, then are we justified in declaring two families which are otherwise unconnected, to be agnates on the sole ground that both families claim as their gotra rishi, the same name. (3) If such an assumption is unfounded then is there justification for keeping in force by legislative authority what is demonstrated to be a purely fanciful prohibition. (4) Should not the Legislature declare that sagotra and samana pravara marriages shall not be invalid so long as the parties are not gotraja sapindas?

We are generally assuming and acting as if the name of a gotra rishi indicates only one human being. In other words we assume that so far as gotras are concerned, no two or more gotra rishis bearing the same name ever existed. It is on this footing that the Bezwada Trilinga Orthodox Sabha resolved that prohibition of sagotra marriages is supported by the eugenic principle discouraging consanguine marriages.

It is said that a pravara rishi is a very distinguised descendant of the gotra rishi. Prohibition of alliance where both gotra and pravara names are identical may be founded on the assumption of an original common ancestor. But, the prohibitions are sought to be imposed even where the gotras are different with a

a common pravara, and where the gotras are the same and the pravaras are different. Some suggest that the gotra name indicates the guru, whom the original ancestor sought and at whose feet he learnt. This view seems also to assume that the gotra name indicates only one individual and that there were no guru asramas where the guru had the same name. Another view is that there are many rishis of the same names and we must go only to samana pravara and samana gotra for exclusion. Even this assumes that as to the samana pravara rishis there was no duplication or triplication of common names. When we investigate the matter more closely, we find it difficult to find any reasonable basis for any of these prohibitions. The only prohibition that can be sustained is the marriage of sagotra consanguine (pithru-varga-) sapindas who observe mutual death pollution. All other prohibitions now current seem to be arbitrary and without any foundation in reason.

According to Vaidyanatha Deekshitheeyam gotras are distributed into five main groups:—(*a*) Eka-Rishi Pravara; (*b*) Dwi-Rishi Pravara; (*c*) Triya-Rishi Pravara; (*d*) Pancha-Rishi Pravara and (*e*) Sapta-Rishi Pravara (having as pravara rishis only one, or two, or three, or five, or seven names).

In each group there are main heads called gotra prajapathi. Each such Prajapathi is the source of one or more gotras. The gotra prajapathy name is not always single. The same name or names appear in more than one of the main groups, *i.e.*, pravara rishi groups. The same name or names also appear in many of the Prajapathy groups. The same name or names also appear in pravara rishi names.

Single Pravara Rishi Group:

I. BRIGU PRAJAPATHY:—

Gotras	Pravaras
Mithrayu Rowshtyayana Sapindina	Vadhryaswa
Sunaka Gathsamada Yagnapathy	Gatsamada or Sownaka.

II. VASISHTA PRAJAPATHY:—

Gotra	Pravara
Vasishta Vythalakavi Raki	Vasishta

III. AGASTHYA PRAJAPATHY:—

Gotra	Pravara
Aidhmavaha Vaisaladya Sphalayana Agasthya	Agasthya.

Two Rishi Pravara Group:—

BRIGU PRAJAPATHY:—

Gotra	Pravara.
Sunaka Gatsamada Yagnapathy	Bhargava-Gatsamada

VISWAMITHRA PRAJAPATHY:—

Lohitha Kundyakya Chakravarnayana	Viswamithra-Ashtaka.
Purana Aindrakowsika Hiranyarethasa Sowvarnarethasa Dhrithakowsika Kathaka	Viswamithra plus Gotra name.

The names Sunaka and Gatsamada appear as gotra names in both one Rishi Pravara and Two Rishi Pravara under Brigu Prajapathy. Sunaka also appears as Pravara Rishi for 4, 5, 6, of one Rishi Pravara. Gatsamada appears also as Pravara Rishi in 4, 5, 6 of one Rishi Pravara and 1, 2, 3 of two Rishi Pravara under Brigu Prajapathy. In the two Rishi Pravara, the Gotra Prajapathy "Viswamithra" appears also as Pravara Rishi in all ten Gotras under Viswamithra Prajapathy. The other name is "Ashtaka" for Nos. 1, 2, 3 and the Gotra name for the remaining seven. Similar duplication will be noticed in others also. From the foregoing alone it is obvious that among Pravara Rishis, many persons had identical names. The assumption now made that the name by itself proves descent from one common ancestor is shown to be absolutely unfounded.

Three Rishi Pravaras.—In this Group the Gotra Prajapathy names are in some cases many. Some names come in more than one Prajapathy group. As the great majority of gotras are in this main group the names of the gotras are not now given. The names of gotra prajapathys with the number of gotras coming under that prajapathy are alone given. The same will be the case also with the Five Rishi main group.

Prajapathy	*No. of Gothras*
Angiras	26
Attri	16
Brigu	28
Vasishta	13
Viswamithra	30
Bharadwaj-Angiras	9
Angiras Gowthama	15
Gowthama, Angiras, Vamadeva	8
Vasishta, Angiras	4
Brigu Viswamithra	1
Kasyapa Marichi	10
Vasishta, Athri, Agasthya	13
Vasishta, Kasyapa, Angiras	2
Bharadwaja, Viswamithra, Brigu, Angiras	2

FIVE RISHI PRAVARA GROUP:—

Prajapathy	*No. of Groups*
Brigu	11
Angiras, Gowthama	1
Gowthama, Angiras	3
Bharadwaja Angiras	7
Bharadwaja Viswamithra, Brigu, Angiras	1

SEVEN RISHI PRAVARA GROUP—

Prajapathy	*No. of Groups.*
Agasthya	1
Brigu, Viswamithra	1

In some groups of gotras, there are alternative pravara groups. An instance would have been already noticed in gotras 4, 5, 6, of Brigu Prajapathy in one Rishi Pravara main. Examples may be taken from the three Rishi Pravara Group. In the Three Rishi Pravara under Angiras-Gowthama Prajapathy, the Gotra Vamadeva has the choice of any one of the three groups of thraya Rishis. They are (1) Angiras-Vamadeva-Gowthama; (2) Angiras Vamadeva-Barhadukhtha; and (3) Angiras-Gowthama-Vamadeva.

In the three Pravara Group under Goutama-Angiras Prajapathy the three Gotras (i) Gargah, (ii) Sambharayana and (iii) Sakeenaya, have the choice of any set of four Three-Rishi Groups:—(1) Angirah-Sainya-Gargah, (2), Angiras-Gargah, Sainya, (3) Bharadwaja-Garga-Sainya, and (4) Angiras-Taithireya-Kapibhuva. These three Gotras will really be gotras with Samana Pravara, but if each selects a different one of the four, they will appear to be different Gotras with different Pravaras.

An analysis of the Pravara Names shows that some names are common to many Gotras. For instance "Angiras" appears as Pravara Rishi in sixty-seven Gotras of Three-Rishi Pravara Group and in twelve Gotras of the Five-Rishi Pravara Group. "Bhargava" appears as Pravara Rishi in 3 gotras of Two-Rishi Pravara, 30 gotras of Three-Rishi Pravara and 10 Gotras of Five-Rishi Pravara. "Viswamithra" appears in 45 Gotras. "Gowthama" appears in 26 Gotras. "Vasishta" appears in 19; "Agasthya" in 17; "Chyavana in 17 Gotras; "Bharadwaja" in 16; and so on.

In Bharadwaja-Angiras Prajapathy Group of Three Rishi Pravara, Kapila Gotra has Viswamithra as one of the Pravara Rishis. Again under Vishwamithra Prajapathy in the Three Rishi Prajapathy Group under Gotra Chakavarnayana, Angiras and Ashtaka appear as Pravara Rishis. These names Visvamithra, Angiras, Ashtaka, among the Pravra Rishis must certainly be different individuals from those of the same name appearing as Gotra Prajapathies, Gotra Rishis, or Pravara Rishis.

From the above, it is crystal clear that one cannot justly infer a common ancestry from the gotra and pravara names being the same.

Suggested Rules.—(*i*) Marriages between Sa-gotras, and or, or Samana Pravaras, are valid, provided the parties are not within seven degrees in direct lineal male ascent from a common male ancestor. The degrees are to be counted from and including either party upwards to the ancestor for seven generations.

(2) Marriages between parties within the seven degrees as in clause (1) are void.

Note:—No special mention need be made as to "Sacramental marriages" at all. The rule covers both such and Registered Marriages.

The following amendments may be suggested:—

Explanation.—(1) An adoption from another Gotra breaks the continuity of consanguinity.

(2) Adoption into a different Gotra will not evade the bar of consanguinity within seven degrees.

Illustration.—(1) Of three brothers A, B, C, B and C have great-grandsons. *A's* grandson has no son and adopts a son *D* from a different Gotra. A daughter or son of *D* may marry a son or daughter in the line of *B* and *C*.

(2) In the above illustration (1) *B's* great-grandson is given in adoption in a different Gotra. The adopted son's son or daughter cannot marry a daughter or son in his natural family.

(3) *A's* grandson adopts a brother of *B's* great-grandson That adopted son's son or daughter cannot marry a daughter or son in the line of *B* or *C*. Consanguine relationship is not broken by the adoption.

SUMMARY OF ENGLISH CASES.

In re WOOD, SKINNER & CO., LTD., (1944) 1 Ch. 323.

Company—Winding up—Payment of provision for payment of debts and preference share capital—Distribution of remaining assets—Preference and ordinary shares—Rights.

A clause in the memorandum of association of a company after providing for the division of the capital of the company into preference and ordinary shares conferred a right to a fixed cumulative dividend of 6 per cent. per annum on the capital paid up on the preference shares and to *rank* both as regards dividends and capital in priority to the ordinary shares. At the date of voluntary liquidation of the company dividends were considerably in arrears. On a construction of the memorandum of association,

Held, that the preference shareholders, had there been any surplus after repaying capital on both preference and ordinary shares would be entitled to participate *pari passu* with the ordinary shareholders in the distribution of the surplus assets. The words "*rank in priority to the ordinary shares*" are intended to cover winding up so far as capital is concerned but so far as dividends are concerned it refers to dividends in the strict sense of the word, *i.e.*, while the company is a going concern. In the context of this case, the word "dividends" is not exchangeable with arrears of dividend.

RELIANCE PERMANENT BUILDING SOCIETY v. HAROOD STAMPER, (1944) 1 Ch. 362.

Building Societies Act (1939), *section* 10—*Power of sale—Exercise of—Duty to realise best price—Fiduciary liability.*

A mortgagee exercising his power of sale, of course, sells primarily for his own benefit. If the mortgagee exercises his power of sale *bona fide* for the purpose of realising his debt and without collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud. A mortgagee exercising his power of sale is not (except as to the balance of the purchase money after a sale) a trustee for the mortgagor even if the mortgage is in the form of a trust for sale. But the obligation which lies on a building society mortgagee selling under its power of sale is similar to that of a fiduciary vendor. Section 10 of the Building Societies Act (1939) was intended to add the building society mortgagee to the class of persons who are counted as fiduciary vendors. A fiduciary vendor must not think of himself at all. He is acting for the benefit of others. He must use reasonable diligence in the manner of the sale and it is his duty to obtain the best consideration in money that can reasonably be obtained. A building society mortgagee may however consult its own convenience as regards the time of sale. Their is no duty on the society to " nurse " the property. Having made up its mind to realise its security it is exactly in the same position as that of a trustee vendor under an obligation to effect a sale at once. The society has a wide discretion regarding the mode of sale, *i.e.*, the mortgagee may sell the property either as a whole or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale, to buy in or rescind contracts and so forth. Lastly the society like any other mortgagee is not answerable for any involuntary loss happening in or about the exercise or execution of the power of sale.

COMPTON, *In re*: POWELL v. COMPTON, (1944) 1 Ch. 378.

Will—Bequest for trust for education of descendants of three named persons—Valid charitable bequest.

A trust for education of the descendants of three families (including twenty-eight descendants at the time of the testator's death) is wide enough to constitute a valid educational trust. Even as a gift in trust for poor relations it is a valid charitable gift.

SOUTHGATE BOROUGH COUNCIL v. WATSON, (1944) 1 K.B. 541 (C.A.).

Rent Restrictions Act—Protection under—Not available to refugees accommodated in house requisitioned under emergency powers and paying rent for it.

A competent authority who has requisitioned a house under the emergency powers has no power under the Defence Regulations to create a tenancy, turning himself into a landlord and turning into a tenant the person who was put into possession of the house because he had lost possession of his own house by enemy action. Such a person cannot resist a claim for possession by the authority by asserting the right of a '*tenant*' to remain in possession under the Rent Restrictions Act.

REX v. I. C. R. HAULAGE, LTD., AND OTHERS. (1944) 1 K.B. 551 (C.A.).

Company—Conspiracy to defraud—Company if can be indicted.

A limited company can be indicted for a conspiracy to defraud. Where in any particular case there is evidence to go to the jury that the criminal act of an agent including his state of mind, intention, knowledge or belief is the act of the company and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.

JAMES CLARK (BRUSH MATERIALS), LTD. v. CARTERS (MERCHANTS), LTD., (1944) 1 K.B. 566.

Arbitration—Award—Error of law—When award can be set aside or remitted for reconsideration.

Where parties choose to go to arbitration—and more especially where they arbitrate before a lay arbitrator and agree to accept his decision, and they do not ask for a case to be stated on a point of law which arises during the arbitration—as they are entitled to do—they cannot complain if they get something which may not appear to them to be justice unless they substantiate the very stringent grounds on which an award can be remitted, or set aside for error of law appearing on the face of it. The facts stated in the award must be taken as they stand and no inferences or suspicions as to facts in the mind of the Court are sufficient to confer jurisdiction to set aside or remit the award for an error of law based on such facts.

HOLMAN v. GEORGE ELLIOT & CO., LTD., (1944) 1 K.B. 591 (C.A.).

Practice—Writ—Discretion of Court to extend time for service—R. S. C., Order 64, rule 7.

There is a discretion in the Court under Order 64, rule 7 to enlarge the time fixed for the validity of a writ under Order 8, rule 1 of the Rules of the Supreme Court.

[The Court of Appeal in *Battersly* v. *Anglo American Oil Co.*, (1944) 2 All.E.R. 387 (C.A.), refused to follow this decision and the conflict is left to be determined by the House of Lords.]

DANZIGAR *v.* THOMPSON AND OTHERS, (1944) 1 K.B. 654 : (1944) 2 All.E.R. 151.

Landlord and tenant—Written agreement for letting—"Tenant" can lead oral evidence that he was agent or nominee of another.

Evidence that a person described as a tenant in a written agreement for letting is only an agent or nominee of another is admissible. The description "tenant" does not negative agency. It means the person "who by this contract becomes liable to the obligations and entitled to the rights which this contract allots to the tenant" and such a description is not inconsistent with a person so described being an agent.

MAITLAND *v.* RAI SBECK AND HEWITT, (1944) 1 K.B. 689 (C.A.) : (1944) 2 All.E.R. 272.

Tort—Nuisance—Accident to lorry by collision with omnibus owing to rear light of lorry going out—Obstruction to highway—Liability.

If a person sustained an accident for which he is in no way responsible, the time may come when failure to take some appropriate steps on his part will render him liable for maintaining a nuisance to the highway. But it cannot be said that a nuisance is created *ipso facto* and immediately if an accident causes an obstruction. A person using a highway is entitled to use it in a reasonable manner and to expect other people to do the same, but accidents on the highway happen even when both parties have been reasonable and neither has misused the highway. If damage arises in those circumstances the person injured must put up with it. *Ware* v. *Garston Haulage Co.*, (1944) 1 K.B. 30, distinguished.

ADEAL MUHAMMAD ELDABBAH *v.* ATTORNEY-GENERAL OF PALESTINE, (1942) 2 All.E.R. 139 (P.C.)

Criminal trial—Witnesses named in indictment—Discretion of prosecuting counsel to examine or not—Practice of tendering such witnesses for cross-examination.

The prosecutor has a discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion, unless perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. If the prisoner called such witnesses, the witnesses should be considered his own. It should however be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination. If need be, the Court has the right of its own motion to call upon persons to give evidence.

ATTORNEY-GENERAL *v.* LLOYD'S BANK, (1944) 2 All.E.R. 157 (K.B.D.).

Income-tax Act (1918), *section* 30—*Penalties for making false returns—Scope.*

Though the false statements of the assessee's total income did not in fact give rise to any larger deductions than would have been the case if he made a true return of his total income, that fact affords no defence to a liability to the penalty prescribed under section 30 of the Income-tax Act, namely, to forfeit the sum of £20 and treble the tax taxable in respect of all the sources of his income.

ASSOCIATED INSULATION PRODUCTS, LTD. *v.* GOLDER (H. M. INSPECTOR OF TAXES), (1944) 2 All.E.R. 203 (C.A.).

Income-tax—Dividend declared by foreign corporations but payable after four years with interest—Assessability of shareholders—Appropriate period.

If a resolution provided for a distribution by way of dividend not of money but of money's worth, the income-tax due in respect of it would be not on the money figure of interest payable on each share, but on the market value of the certificate (of indebtedness issued by the company for such dividend made payable with interest four years thereafter) on the date of their distribution multiplied by the number of shares held. But where the reality of the transaction is the declaration of a money dividend payable not presently, but only on a future date (four years after) then it follows that till the due date arrived and payment was in fact received by the shareholder no income can be said to have arisen from the possession of foreign shares.

(1944) 1 All.E.R. 533, affirmed.

Re HURL-HOBBS, (1944) 2 All.E.R. 261 (C.A.).

Local Government—Borough Council—Disallowance by auditor of additional payments to a contractor—Appeal—Contractor concerned not a "person aggrieved" who has a right to appeal.

Where the district auditor had disallowed certain additional payments to a contractor as contrary to law and surcharged them to the councillors responsible for the decision, the contractor cannot be said to be a person aggrieved within the meaning of section 229 (1), Local Government Act, 1933, and therefore he has no right of appeal.

OFFICE CLEANING SERVICES, LTD. *v.* WESTMINSTER OFFICE CLEANING ASSOCIATION, (1944) 2 All. E.R. 269.

Trade name—Passing off—"Office Cleaning Services" and "Office Cleaning Association"—Descriptive names and sufficiently-distinctive.

Where the words "office cleaning," which are descriptive, have been incorporated by the plaintiffs in their name "Office Cleaning Services" and there has been no deliberate intention to deceive on the part of the defendants in the assumption of the trading style of "Office Cleaning Association," unless the plaintiffs can establish a monopoly of the use of those words on the ground that they have acquired a secondary or subsidiary meaning they cannot obtain such a monopoly by reason of the fact that there is some risk of confusion if those words are used by another. In the absence of any fraudulent intention, a small differentiation is sufficient to defeat the plaintiffs' claim. The difference between the words "services" and "Association" is sufficient to distinguish the defendants' business from the plaintiffs' who cannot therefore restrain the use of the name by the defendants.

YOUNG *v.* BRISTOL AEROPLANE CO., LTD., (1944) 2 All.E.R. 293.

Precedents—Court of Appeal—Bound by previous decisions of itself and of Courts of co-ordinate jurisdiction—Full Court of Appeal and division Court—Powers.

A full Court of the Court of Appeal has no greater powers than any division of the Court. The Court of Appeal is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule are: (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (*ii*) The Court is bound to refuse to follow a decision of its own which though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (*iii*) The Court is not bound to follow a decision of its own if it is satisfied that the decision was not given *per curiam.*

R. *v.* GRANT, (1944) 2 All.E.R. 311 (C.C.A.).

Criminal trial—Evidence of one prisoner against another—When admissible.

It is not competent to call as prosecution witnesses other prisoners who are themselves jointly charged with the same offence; in any event it is most undesirable. It is quite contrary to the spirit in which the criminal law of the country is administered. In the case of an indictment of two or more persons one prisoner may give evidence for the Crown against a co-prisoner, (1) where a *nolle prosequi* has been entered; (2) where a verdict of acquittal has been given: or (3) when though jointly indicted he is not being tried with the prisoner against whom he gives evidence.

R. *v.* SORSKY, (1944) 2 All.E.R. 333 (C. C. A.).

Controlled goods—Limitation of Supplies Order (1940)*—Agreement to sell to quota holder and then undertaking to sell the goods as agent of that quota holder—Contravention of the order—Conspiracy to contravene terms of order—Charge of—*Mens rea*—If necessary.*

A company controlled by *B* dealt in clothing and similar material. During 1940 much of their stock was destroyed by enemy action with the result that they were left with no stock of goods, but by virtue of their trading in the standard period, they had the right to deal in goods and the company owned the quota for such goods. *S* who owned a similar business held large stocks of goods but lacked the necessary quota to enable his concern to sell to its unregistered customers as it desired. *B* and *S* met and agreed that *S* should sell to *B* the controlled goods and should sell as the agent of *B* those same goods to *S's* customers. That agreement was carried out. In this way controlled goods were in fact supplied to unregistered persons in excess of *B's* quota.

Held, (1) *B* was the supplier of the goods under the agreement and was guilty of a contravention of the limitation of supplies order. (2) Absence of *mens rea* was no defence to a charge of conspiracy to contravene the terms of the order.

MARSH *v.* COMMISSIONER OF POLICE AND ANOTHER, (1944) 2 All.E.R. 392 (C.A.).

Innkeeper's lien—Ring handed to innkeeper as security for bill—How far subject to the lien.

On 24th November, 1942, *N* was received as a guest at the R Hotel where he stayed until 29th November, 1942, incurring a bill for £66-6-11. On 25th November, 1942, he obtained from certain jewellers a ring on approval (of the larceny of which he was convicted on 12th January, 1943). On 28th November, *N* being unable to meet the hotel bill handed the ring to the hotel authorities as security for the payment of the bill. When the jewellers claimed the ring as the true owners the hotel proprietors claimed an innkeeper's lien on it.

Held, the innkeeper's lien attached to the ring when it was brought into the hotel. If a person takes jewellery to the hotel or obtains it when he arrives there or acquires it during his residence there

and takes it to the hotel there is no more reason why the lien of an innkeeper should not attach to that property than to the clothes which the guest takes with him.

(1944) 1 All.E.R. 161 (K.B.D.) : (1944) 1 K.B.D. 99, reversed.

Re DUPREE'S TRUSTS, (1944) 2 All.E.R. 443 (Ch.D.).

Charitable gift—Gift for promoting a chess tournament for boys under 21 years of age resident in a named city—Educational value and validity.

A donor wished to promote a chess tournament for the encouragement of chess playing, to be competed for annually by boys or young men under the age of 21 years resident in the city of Portsmouth, and to provide for prizes to be awarded in connection with the tournament and in furtherance of those wishes he transferred to trustees shares representing a sum of £5,000 the income of which was to be utilised for the purpose. The prizes were not to be paid in cash but were to be provided by the trustees for the benefit of the winners, as they might think fit, for the advancement in life of such winners.

Held, the nature of the game of chess is such as to encourage the qualities of foresight, concentration, memory and ingenuity. The game is essentially one which possesses an educational value and the benefit being confined to a well-defined area there is a good charitable trust.

BOOK REVIEWS.

RIGHTS OF WOMEN UNDER THE HINDU LAW, by J. R. GHARPURE, B.A., LL.B., F.R.S.A., published by the University of Bombay, 1943. Price Rs. 2-8-0.

Writers like J. S. Mill and H. S. Maine, have stated that the elevation or debasement of women is the surest test and the most correct measure of the civilisation of a people or an age. Tennyson expressed much the same idea in the language of poesy when he said:

"Woman's cause is man's; they rise or fall
Together, dwarfed or godlike, bound or free".

The sentiment is embodied most felicitously and altogether in a higher plane in the picturesque statement of Manu:

यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः

The ideal had however everywhere to experience the impact of hard and concrete facts of actual life. And in the process it suffered. The biological differences in the constitution of the sexes together with the ordering of society the world over on lines where physical strength and force formed the ultimate sanction have led to distinctions being made in regard to rights and duties, to the disadvantage of women. In the present book, which contains the first Sir Lallubhai A. Shah Lectures arranged by the University of Bombay and delivered by Professor Gharpure, an outline is given of the vicissitudes which women's status has undergone among Hindus through the succeeding ages, from the Vedic times to the present day, through the period of the Sutras, Smritis and Commentaries. The position of woman as daughter, wife and mother are carefully examined and a correct picture of the development of their rights given. Certain views of the author such as that there is no reason why a spinster cannot adopt, or that the prohibition of sagotra marriages was an innovation of the post-Vedic period, etc., may be debatable. The statement on page 33 that marriages where they are of an anuloma character are certainly valid has at least in Madras not been accepted, see *Subbaramayya* v. *Venkatasubbamma*, (1941) 1 M.L.J. 724. In a book published under such high auspices one would wish that typographical errors could have been altogether avoided. The publication is a valuable and welcome addition to the literature relating to women's rights.

THE TRANSFER OF PROPERTY ACT, by Messrs. Chitaley and Annaji Rao, 2nd edition, 1945. Published by the All India Reporter, Ltd., Nagpur, Vols. II and III.

The second volume deals with sections 54 to 104 and the third with sections 105 to 137 of the Transfer of Property Act. The law stated is as on the 1st September, 1944, and the 1st December, 1944, respectively in the two volumes. Along with the first volume they constitute an almost complete case-book on the subject. The comments on the sections are arranged under appropriate headings and are generally helpful. One or two suggestions may however be made. The need for note 25 citing two decisions of the Bombay High Court and in that form under section 60 is not easily discernible in view of notes 27 and 28 to section 69. The conflict of judicial opinion in regard to the question whether where a first mortgagee of two items of property, one of which is the subject of a second

mortgage as well, releases the item not covered by the second mortgage, the second mortgagee can claim marshalling, disclosed by the decisions in A.I.R. 1938 Madras 503 on the one hand and I.L.R. 34 All. 606 and A.I.R. 1931 All. 625 on the other might have been appropriately adverted to at one place, while as it is, the first decision is cited under note 10 to section 56, the second under note 43 to section 60 and the third under note 19 to section 82. In regard to citations it looks as if it has become the settled policy of the A.I.R. publications to give only the A.I.R. references always, the I.L.R. references in regard to cases reported therein and references to provincial journals only if the decisions are not found reported elsewhere. Notwithstanding these, it may easily be conceded that the busy practitioner will always find the present publication extremely useful and convenient.

LABOUR AND FACTORY LEGISLATION IN INDIA, by H. M. Trivedi, B.SC., *Barrister-at-Law*, Published by N. M. Tripathi, Ltd.; Bombay, Price Rs. 15.

When Oliver Twist asked for more the beadle stood aghast at the temerity of the Poor House inmate. Ruskin's "bag-barons" expressed similar wonderment when the "rag-barons", the factory workers demanded better conditions. It has ever been the same. The whirlgig of time however brings on its revenges. The two great wars of this century have brought home as nothing else has done that labour must receive fair-play if it is to be kept fully mobilised and at an efficient level. It would make no difference whatever whether industries are to be nationalised or continued under private enterprise. Soviet Russia may have lessons to afford in this matter. Better standard of living for the workers, minimum wages, limitations of hours of work, housing facilities, maternity benefit, old age insurance, protection against sickness and unemployment, compensation for injuries sustained in the course of employment, employment of women and children, sweated labour, these and other cognate problems will have to be tackled with imagination and courage. Employment of women underground contrary to the spirit of international undertakings was recently brought to light by interpellations in the Legislature. Post-war planning is being seriously taken on hand in England and America, and the Beveridge Report has set a wholesome and useful ideal before the country in regard to the problem of social security. Government's handling of labour reform in the past has not revealed much vision nor provoked any enthusiasm. Many of the recommendations of the Whitley Commission have been shelved. In this state of affairs it would certainly be helpful to know what little has been done in the past and how much more remains to be achieved in the future by way of labour and factory reform. It is here that the present publication assumes great value. The book is laid in four parts. The first two deal with pre-war legislation—the Acts of the Government of India and the Government of Bombay till 1st September, 1939. The last two parts contain what may be called "war-time labour and factory legislation" consisting of Acts and Ordinances promulgated after 1st September, 1939. The rules issued under the various Acts as well as important notifications are also given. The Introduction indicates briefly the main features of the Beveridge plan and contains an interesting discussion of the problem of social legislation as it affects our country. It is easy to endorse the words of Dr. Ambedkar in his Foreword that the book will prove very useful to all those who are in any way connected with labour administration of factories, mines, railways, etc., as well as to the members of the legal profession. We cordially welcome the publication.

LAW OF HOARDING AND PROFITEERING, by Mohammud Daud, M.A., LL.B., Inspector (Hoarding and Profiteering Prevention), Lucknow, 1945, Retail Price Rs. 5; Distributors, The Universal Publishers, Ltd., Hazratganj, Lucknow.

Hoarding and profiteering are twin evils resulting from abnormal economic conditions, and have contributed to the growth of what is familiarly known as the "black-market". To ensure an equitable distribution of essential articles and to make them available at basic rates, the Hoarding and Profiteering Ordinance of 1943, was promulgated. Experience acquired in working its provisions has brought to light various loopholes which have to be covered before the measure could produce beneficent results or successfully worked Amendments to the Ordinance have been from time to time made for this purpose and quite a large number of notifications, orders and instructions have also been issued by the Central Government. The present volume is intended to serve as "a sort of propaganda book". One of its chief merits is that it accumulates and presents all the copies of amended as well as unamended notifications thereby enabling one to know the law in regard to the matter as it stood at any particular point of time. The notifications issued so recently as March also find a place. The author has given short explanatory notes to each section of the Ordinance which coming from one concerned with its administration is bound to be valuable, particularly to lay people. With greater care, typographical mistakes, of which there are plenty, could have been reduced. The Advocate-General of India is mentioned on p. 13 as D. N. Mitra. This is evidently a mistake for Sir Brojendra Lal Mitter. Again on p. 17 "Pallock" ought to be "Pollock". Notwithstanding these and similar mistakes the book is sure to prove useful to all.

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RECENT RETIREMENTS FROM THE BENCH.

Within a few days of each other, Mr. Justice King and Mr. Justice Mockett have retired from the High Court Bench. Both had a fairly long tenure of office having served as Judges for more than a decade. As Judges they typified two different types of training with corresponding differences in outlook and approach. The former, as a member of the Indian Civil Service, came to the Bench with an intimate knowledge of the conditions of life of the people of this Presidency, their customs and usages, and the revenue and land laws applicable to them. His approach to the questions coming up for adjudication before him was to some extent influenced by this factor. He would like to have the broad facts of a case always; the details were not to be overstressed. Nor was he for indulging in excursus into the history of the law or its evolution where he felt the facts to be clear or as not affording scope for elaborate legal arguments or citation of authorities. There was something wistful in the learned Judge's remark, in the course of his reply to the reference made by the Advocate-General, that not having practised at the Bar he had not the advantages resulting from such training. During the earlier years, Mr. Justice King was always suave, patient and courteous even where he might feel an argument to be prolix. In later days, probably due to poor health, there was noticeable occasionally a touch of impatience. But justice never suffered. Quick to grasp the facts of a case however heavy the case might be, the learned Judge had the gift of marshalling the facts and delivering even long judgments altogether *ex tempore* without a pause and scarcely with any reference to his notes.

Mr. Justice Mockett went to the Bench directly from the Bar. He had first-hand knowledge of the conditions of the Bar and of the hard work which its members had to put in often with inadequate remuneration. He was therefore genuinely sympathetic towards them. He was a very conscientious Judge and conscious of his limitations. He was patient and thorough and anxious to make sure of every step before he proceeded to the next and wanted to have all the facts of a case before arriving at conclusions. He was comparatively slow but was steady. As was aptly remarked: "He realised the great truth that each case was important to the parties in the case." Both Mr. Justice King and Mr. Justice Mockett were associated with humanitarian activities in the city prominently, the former with the Y. M. C. A. and the latter with the S. P. C. A. in particular. The public of Madras will miss these figures for a long time.

MADRAS BILL FOR SURCHARGE ON STAMP DUTY.

A taxing statute is always obnoxious to the tax-payer, but looked at from any point of view the proposal of the Madras Government to levy a surcharge on stamp duty is not justified. The object of the bill is stated as follows: "The cost of the administration of municipalities and local bodies has of late increased considerably and their present resources are found totally inadequate. Local bodies also require considerable additional funds for schemes for post-war development." The proposed levy is confined to instruments of sale, gift and mortgage with possession of immoveable properties and the rate of surcharge is sought to be fixed in the first instance at Rupees Two per cent. on the amount of the consideration, the value of the property or the amount secured by the mortgage as the case may be. The maximum rate provided in the bill is Rupees Five per cent. on such value.

The propriety of the proposed levy may be examined from two ends, that of the tax-payer and that of the Government. It is well known that properties consisting of lands are largely owned in this Province by way of small holdings, and the peasant-

proprietor or petty landlord is frequently put to the necessity of effecting mortgages with possession thereof, and oftentimes the period fixed for redemption is confined to a few years. Voluntary transfers again are on the increase by reason of fragmentation of holdings which is largely due to the rules of partition. In those cases the increase in stamp duty will undoubtedly work a great hardship. It is no consolation to the tax-payer to be told that he will get in return certain advantages in the schemes of post-war reconstruction, as such advantages from his view point are uncertain, and he will be justified in asking the Government if there are not other sources of revenue, or at any rate why persons who directly benefit by such schemes when taken on hand should not be made to pay therefor.

One of the several defects in the Devolution Act has proved to be the transfer of subjects such as court-fees and stamp duty to the Provincial Governments. Not only have the scales of duty in the several Provinces become widely different, but most of the Provincial Governments have taken to those sources of revenue with something like the proverbial greed of the money-lender. It is well known that the scale of court-fees and stamp duty prevailing in Madras is the highest prevailing in India today, and it is needless to say that the scales of duty prevailing in this country is far higher than those prevalent in England or America. At least the increased levy of court-fees might professedly be justified on the ground that it is intended as a check on the growth of vexatious litigation. But the policy of the State regarding transfers of immoveable properties is that they should move about freely. It may be remembered that by the recent Act XVI of 1943, the Madras Government has made the stamp duty twice in some cases and one and a half times in other cases of what it was previously, and with the proposed levy the executant of a sale deed will be paying Rupees Five where before 1943 he was paying Rupees one and annas eight. It may well be asked why he should be surcharged like this when in an enlightened and at the same time a deficit Province such as Bengal, the Government has been carrying on with the old scale of stamp duty, namely, Rupee one and annas eight only per cent.

Is there anything to justify the measure on grounds of state policy? In this connection certain matters are worth considering. In the first place, the measure is brought in by an interim Government at a time when the popular Government is not functioning, and it therefore violates the rule "No representation, no taxation." Secondly, no attempt is made to show that the Government is unable to place a small portion of its existing resources at the disposal of the local bodies. The levy of the sales tax and the proposed levy of agricultural income-tax, not to speak of the healthy financial position of the Provincial Government, should be enough to place the local bodies in funds for any scheme of reconstruction they may have on hand. The taking over of public utility and transport concerns by those bodies should be considered a better mode of improving their finance than the proposed levy. And in respect of big capital schemes the proper course is to encourage a scheme of limited borrowing by local bodies and not to increase taxation all round. Nor can the proposed levy be justified as an anti-inflationary measure. If the prices of immoveable properties have recently gone up the stamp duty payable in respect of them is also proportionately larger.

In the statement of objects the measure is sought to be justified by reference to the fact that the Corporation of Madras is now levying a surcharge on such transfers. But one important distinction between conditions in the City and in the mofussil is that in the City equitable mortgages by deposit of title deeds form a common feature, and in those cases no stamp duty is payable. It is not necessary to discuss here why such transactions should not be recognised also in the mofussil by having the law suitably amended, and why landholders should not have the benefit thereof after rationalising the mode of issuing title deeds to immoveable properties. It is sufficient to say that conditions in the mofussil being different it is unsafe to draw on the city analogy. In fact the recent enhancement of the general stamp duty in the Province may be a good ground for taking away the surcharge levy in the City. It is submitted that the proposed bill is not called for in the present circumstances. At any rate, it is hoped that the bill will not become law till the popular legislature has had an opportunity to pronounce its opinion about the proposed measure.

B. V. V.

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HOW THE MADRAS HIGH COURT WORKS.*

BY

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I must first explain briefly the structure of the High Court. It is divided vertically into a civil and a criminal side. Horizontally it is divided into the Original Side and the Appellate Side. For those who are unfamiliar with legal phraseology I must explain that the Original Side deals with the actual trial of cases in which evidence is recorded and the first decision is given. Thus the High Court consists of four sections. The first deals with the Original Side civil work. Anyone in the City of Madras wishing to file a suit for over Rs. 5,000 starts his action on the Original Side of the High Court and the trial of the suit takes place before one of the Judges doing Original Side work. (The City Civil Court deals with suits up to Rs. 5,000). The second section of the High Court deals with the Original Side criminal work, which consists of the Sessions cases committed for trial in the High Court after a preliminary enquiry by one of the Presidency Magistrates. The third section attends to the Appellate Side criminal work which includes the hearing of Referred Trials (*i.e.*, cases in which Sessions Judges in the mofussal have passed sentences of death, which have to be confirmed by a Bench of two Judges in the High Court) and the hearing of criminal appeals from the judgments of Sessions Judges and magistrates. Since 1943 there have also been appeals from the decisions at the High Court Sessions. The fourth section of the High Court is by far the largest and deals with the civil appellate work which includes Original Side Appeals from the decisions of the Judges sitting on the Original Side of the High Court, City Civil Court Appeals, First Appeals from judgments in suits for over Rs. 5,000 tried by District Judges and Subordinate Judges in the mofussal, Second Appeals from the judgments given by District Judges and Subordinate Judges in appeals heard by them from the decisions in suits heard mostly by District Munsiffs, Letters Patent Appeals, which are possible in certain cases from the decisions of a Judge of the High Court sitting alone, and Civil Revision Petitions which can be filed by parties against certain decisions given by mofussal judges in cases where no appeal lies. (My description of these various classes of cases is given in general terms and is not intended to be either comprehensive or quite exact).

The first point to be emphasised in connection with the administration of the High Court—and, indeed, in connection with the administration of justice throughout the province—is that the Chief Justice is the head of the judiciary and responsible to no one except His Majesty the King-Emperor, though, of course, his powers, duties and responsibilities are defined and limited by law. It is the Chief Justice who decides which Judges shall sit together and deal with the various classes of cases. Judges are after all human and certain Judges work well together and

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form a balanced Bench for, say, First Appeals or Referred Trials. For the last five years two Judges—one a European member of the I. C. S. and the other an Indian lawyer—have been sitting together. They have been a most successful combination for dealing with the many legal and practical problems which have arisen out of the Madras Agriculturists' Relief Act. There are some Judges who have specialised in criminal work. They are suitable for sitting on the Referred Trial Bench. Other Judges by reason of their temperament or previous experience at the Bar are suitable for dealing with the Original Side work which involves the hearing of evidence and controlling the examination of witnesses. Thus it is clear that the smooth and efficient disposal of the judicial work of the High Court depends to a large extent on the wisdom of the Chief Justice in choosing the Judges most suitable for each class of work. Incidentally, it is the Chief Justice who advises His Excellency the Governor with regard to the men to be recommended from the services or the legal profession to His Majesty for appointment as High Court Judges. A good lawyer will not necessarily be a good Judge and it is not always the most senior District Judge who is the most suitable for appointment to the High Court. In this respect also the Chief Justice must be a good Judge of character and ability.

However, the Chief Justice cannot personally attend to all the details of the High Court work or even decide all the important cases. Therefore while the Chief Justice is ultimately responsible for the general policy adopted in the administration of justice, he acts in consultation with the other Judges and delegates some of his functions not only to them but also to the Officers of the High Court. For example, in connection with allotment of the cases to the Judges, while the Chief Justice settles every week what is called the weekly sittings list, which sets out the class of work which each Judge will attend to during the following week, it is left to the Deputy Registrar under the directions of the Registrar to decide which particular cases will be posted each day before each Bench.

In the same way the administrative work has to be delegated by the Chief Justice to various Judges, though the Chief Justice deals with all important matters himself. One of the senior Judges, usually a member of the I.C.S., deals with the posting, transfer and promotion of District Munsiffs and Subordinate Judges, but no orders with regard to Subordinate Judges and no recommendations to Government with regard to District Judges are made without the specific approval of the Chief Justice. Indeed the selection of District Munsiffs for promotion as Subordinate Judges and of Subordinate Judges for promotion as District Judges is made only after the Chief Justice has consulted all the Judges at a Judges' meeting. One of the Judges acts as the Chief Justice's Chancellor of the Exchequer and is in charge of finance which involves the distribution of the money allotted by Government for expenditure on the administration of justice. It is part of his work to see that the staff of the mufassal Courts, particularly the establishment for serving processes and making certified copies, is neither excessive nor insufficient. This Judge also sanctions proposals by District Judges for spending money on items of expenditure, such as advertisements in newspapers, which District Judges are not empowered by Government to incur. Another Judge considers proposals for the establishment of additional Courts to dispose of arrears of work which accumulate from time to time in some Courts. Then there is a Judge who supervises the work of the Official Receivers who deal with the property of insolvents in the mofussal. Other judges are in charge of such subjects as the inspection of the Subordinate Courts and the District Munsiffs' Courts by the District Judges, the amendment of the rules which govern Court procedure and the conditions of service of the officers and staff of the mofussal Courts, alleged professional misconduct by Advocates and Pleaders, the appeals filed by clerks who have been punished or overlooked for promotion by District Judges and so forth. All these subjects are dealt with by means of files which are circulated to the Judges by the Registrar in the same way as a Secretary to Government circulates files to an Adviser or a Minister. Certain files, for example those dealing with professional misconduct,

are circulated to two or even three Judges, of whom the Chief Justice himself may be one. Normally the decision of the individual Judge or committee of Judges dealing with the file goes out as the decision of the High Court but the Chief Justice himself sees all the important files and it is one of the duties of the Registrar to see that no general principle is laid down and no important question of policy decided without the Chief Justice's approval being obtained.

Further the twenty-five Districts in the Province are distributed among the Judges for supervising the judicial work in those districts. The periodical returns showing the civil and criminal work disposed of in a district, which are submitted by the District Judges and the District Magistrates to the High Court, are placed before the Judges in charge of the district concerned. Thus it is possible for the Judge in charge of a district to watch whether cases are being disposed of promptly or whether arrears are accumulating which call for the appointment of more Judges or Magistrates in that district. The Judge in charge of a district reads all the judgments in Sessions cases from that district. All Second Appeals and Civil Revision Petitions from a district are placed before the Judge in charge of that district for admission, that is to say, for decision whether they should be dismissed forthwith or whether notice should be sent to the other side and the matter heard on its merits. This enables the Judges to watch the quality of the judicial work of the District Judges, Subordinate Judges and District Munsiffs in the districts in their charge. This is important when the Judges meet—about once a year—to decide which Subordinate Judges and District Munsiffs are fit for promotion. Obviously all the Judges cannot watch the work of all the 26 District Judges, 37 Subordinate Judges and 141 District Munsiffs in the Presidency. It is by this distribution of the districts among the Judges for supervision that the very necessary detailed scrutiny of the work of the mofussal courts by the High Court is achieved.

The Chief Justice and the Judges cannot do their judicial and administrative work without the assistance of a large staff, divided into appropriate departments, to prepare the papers for them so that the judicial and administrative decisions of the High Court can be arrived at and issued promptly. The staff of the High Court consists of seven Gazetted officers, over 300 ministerial officers and clerks and more than 200 peons and menials.

The Registrar is the chief Gazetted Officer and the other officers, except the Master and Official Referee, who have special judicial functions, are his assistants and act in his name. It is the Registrar's duty to supervise all the departments of the High Court and see that the administrative machine is working properly. He is the officer who receives directions from the Chief Justice and the Judges and it is his duty to see that those directions are carried out. In Army language he is the High Court's Adjutant and he occupies in the High Court office the position which the Chief Secretary occupies in the Secretariat. When I went to the High Court, one of the Judges told me that the Registrar was the ears, eyes and mouth of the High Court. He has to listen to anyone with a grievance or a suggestion, look into all the details of the High Court work and speak as the voice of the High Court in communicating with Government and the mofussal Courts. I might add that he is also the nose of the High Court. He must smell out any malpractices, grievances, dissatisfaction or inefficiency in the High Court itself or in the mofussal. From this it will be seen that the Registrar really has what are commonly called multifarious duties.

There are however certain definite duties assigned to the Registrar. Perhaps the most important—and certainly one of the most responsible—of his duties is the control of the High Court funds. First of all there is the money allotted in the Government Budget to the High Court for expenditure on the administration of justice in the High Court and in the mofussal Courts. Proposals are made to Government for the allotment of money for various purposes, such as the purchase of books, the repair of furniture, the payment of menials and other items of office

expenditure. When the Budget has been settled by Government, the money on these various items has to be distributed to the various Courts according to their needs. Usually the money provided is not as much as is asked for and some Courts have to be told to postpone for another year their proposals, say, for enlarging the room occupied by the local Bar Association. The Registrar has to go into all these questions and with regard to the money appropriated to the High Court for its own use, the Registrar has to see that it is wisely spent and that the Budget estimate is not exceeded. This is a matter for which the Registrar as head of the office is primarily responsible and in this respect he does not take orders from the Judges, though the Budget estimate sent to Government and the distribution of the Budget allotments to the High Court and the mofussal Courts is sanctioned by the Judge in charge of finance.

Apart from the public money allotted by Government for expenditure on the administration of justice, there are large funds in the hands of the Registrar which are not public monies, but belong to litigants and private parties. Over these funds the Government has no control and they are held by the Imperial Bank in the name of the Registrar. They amount to about fourteen lakhs in cash and thirty-three lakhs in securities. They are kept in three accounts, the Civil Courts deposits Original Side, the Civil Courts deposits Appellate Side and the Suitors' Fund account. The first two largely consist of money deposited in the High Court to satisfy decrees which have been passed or are expected to be passed and of cash and securities deposited by parties who have appealed to the Privy Council as security for the costs in the appeal to the Privy Council. Money is constantly being paid in and out of these accounts. All this is supervised personally by the Registrar, who is the only person who can operate on these accounts. The third account, the Suitors' Fund account, consists of money whose ownership is not in dispute, but which cannot be paid out because the beneficiaries are minors or for some other similar reason. As far as possible the money in this account is invested. Judicial orders are passed by the Judges with regard to the payment into, the payment out of and the investment of money in these accounts and it is the duty of the Registrar to see that the orders of the Court are correctly carried out. He is the only officer who can sign cheques and he personally initials the ledgers and day books prepared by the clerks in the Account Department for all transactions on these accounts.

Another important branch of the Registrar's work may be described as the work of Secretary to the Judicial Department. In the same way as Secretaries to Government issue the orders of Government and carry on correspondence on behalf of Government the Registrar issues the orders of the High Court and corresponds with Government, the mofussal courts, etc., on behalf of the High Court. This secretarial work is done by what is called the Administrative Department of the High Court, which works directly under the Registrar, who is assisted in the issue of routine letters, such as reminders by the Assistant Registrar. The Secretariat method of files maintained on the Tottenham system with personal registers, periodical registers and so forth is followed in the High Court. Almost all the files which go to the Judges are seen by the Registrar, who may merely initial them, make a note on them or send them back for re-writing on different lines. Among the important subjects on which files are circulated to the Judges are the posting of Judicial Officers, the amendment of rules, professional misconduct, Bills circulated for the opinion of the Hon'ble Judges by the Legislative Department, the district administration reports and budget proposals.

Talking to people, passing the accounts, and minuting on files take up the greater part of the Registrar's day. Such time as is left is spent in attending to the ordinary routine work which arises in a large office. Weekly reports are submitted to the Registrar on the out-turn of the clerks engaged on preparing cases for the Government Press who print the records in all important cases heard by the High

Court. The quality of the translation work of the acting Translators has to be examined and the unsatisfactory men weeded out. The Registrar is in control of the establishment, and grants leave to the clerks and transfers them from one department to another. He makes the promotions except in the higher categories and with regard to those he makes recommendations to the Chief Justice. He also takes disciplinary action, if necessary, against the clerks. The High Court clerks are recruited by the Registrar and not by the Public Service Commission. In connection with the Court work the Registrar obtains the orders of the Chief Justice with regard to the sittings list and the posting of important cases. He allots the briefs to the Advocates in the Referred Trial panel who defend persons who do not engage a lawyer to appear for them when their cases come up for confirmation of the sentence of death passed on them by the mofussal Sessions Judges. He sanctions the fees payable to these Advocates. He is responsible for keeping the books in the High Court Library up to date. In connection with the enrolment of Advocates, he has to see that the candidates are qualified and that they sign the roll of Advocates in the Chief Justice's Court. The Registrar is also Honorary Secretary of the Law Reporting Council which supervises the publication of the Madras Series of the Indian Law Reports.

The chief assistant of the Registrar is the Deputy Registrar. His work is largely of a judicial character and he does much of the work which the Registrar did before the High Court grew as large as it is to-day with sixteen Judges. He is concerned only with the Appellate Side. When appeal petitions are presented which are defective in some respect—for example, the names of the parties are not correct or the court-fee paid is insufficient—the Appeal Examiners note on the petitions what the defects are and the Deputy Registrar looks into the papers and signs the endorsements returning the petitions. If the appeal petitions are in order the Deputy Registrar admits them and directs the issue of notice to the respondents, except that in Second Appeals and Civil Revision Petitions the papers are circulated to the Judge in charge of the district concerned and the Judge decides whether to admit these cases forthwith or whether to have them posted in Court for hearing the Advocate for the appellant or revision petitioner on the question whether the cases should be admitted or dismissed without the issue of notice to the respondents. About 2,000 Second Appeals and nearly as many Civil Revision Petitions are filed every year and a considerable amount of judicial time is saved by having them dealt with by the Judges in the first instance as these cases can only succeed if the lower Courts have gone wrong on a point of law or have acted without jurisdiction. The Deputy Registrar also holds Court two or three times a week and deals with miscellaneous petitions for further time to point out portions of the record which parties wish to have printed, for further time to pay bills for printing charges, for appointment of guardians *ad litem* of minors, for the addition of the names of the legal representatives of deceased appellants and so forth. These are routine judicial matters on which it is unnecessary that the Judges should spend their time. If any matter is contested the Deputy Registrar has it posted before the appropriate Judge in Court. The Deputy Registrar is also in direct control of the Bench Clerks Department. After the Judges have pronounced judgment in Court a formal judgment and a decree setting out the Court's decision are drawn up in the Bench Clerks Department. These are scrutinized by the Deputy Registrar and signed by him. The Deputy Registrar arranges the daily lists of cases to be heard by the Judges under the supervision of the Registrar in accordance with the weekly sittings list. On the administrative side the Deputy Registrar has statements submitted to him so that he can see that there are no delays in the Bench Clerks Department in the preparation of decrees and in the Notice Section in the issue of notices to respondents in appeals. He also helps the Registrar in supervising the Accounts Section,—for example by checking up the items included in the contingent bills put up to the Registrar for signature and by having the vouchers cancelled. By reason of his close contact with the Appeal Examiners Section, the Bench Clerks Department, the Notice Section and the Posting Section he is able to give good

advice to the Registrar about the fitness of the clerks in those sections for promotion and so forth. He makes the appointments of peons and other menial servants and they are under his disciplinary control.

The only other Gazetted Officer on the Appellate Side is the Assistant Registrar, who is usually a junior officer. Briefly, his work is to help the Registrar and the Deputy Registrar in the less important judicial and administrative matters on the Appellate Side. He submits routine papers, such as mofussal Sessions judgments and judgments for reporting, to the Judges for their perusal and remarks. He passes the draft orders in simple cases, *e.g.*, the addition of legal representatives and the appointment of guardians. He signs the decrees and formal judgments in cases where the appeals are dismissed. He also holds Court two or three times a week and deals with simple miscellaneous petitions for short extensions of time, for pointing out portions of the record to be printed or for paying printing bills. One of his most important duties is dealing with the correspondence received in the High Court. The "tappal clerk," as he is called, sits in his room opening the letters and sending them to the proper departments. He also checks the accounts of the remittances to the bank before they are taken to the Registrar for signature. He attends to routine correspondence such as the issue of reminders and calling for further information before files are submitted to the Registrar. The quarterly returns from the districts showing the criminal and civil cases instituted, disposed of and pending and the notes of the District Judges' inspections of the Courts in their districts are put up by him to the Judges concerned unless, of course there is some special feature in the returns or the inspection notes which calls for the Registrar's personal attention. He is also in charge of the stationery and sees to the issue of it to the various departments.

The other four Gazetted Officers of the High Court work on the Original Side. Of these the Master, who ranks next to the Registrar, and the Official Referee do only judicial work. The Master is the Deputy of the Original Side Judges and does much of the preliminary and routine judicial work that would otherwise occupy much of the Judges' time. It is not possible to enumerate all his duties, but I will give some examples. He passes the decrees in cases where the defendant has not obtained leave to defend. He settles the issues in contested cases. He disposes of contested applications for execution and for the payment out of money deposited in Court in satisfaction of decrees. He passes orders on applications for leave to sue as a pauper, and is the Taxing Officer of the Court. On the Insolvency Side he passes adjudication orders in petitions presented by the debtors themselves, passes protection orders, issues warrants against defaulting insolvents on applications made by the Official Assignee and deals with applications by creditors for unclaimed dividends. The Master has the power to refer to the Judge concerned any matter which he considers it proper that the Judge should decide. Any party affected by an order of the Master can have the matter referred to the Judge.

The Official Referee is a Commissioner of the Court. When a decree has been passed by a Judge sitting on the Original Side in a suit for partition or for accounts, which requires to be worked out in detail before the dispute between the parties is finally settled, the matter is referred to the Official Referee, who after taking evidence makes a report to the Court. The Judge then passes final orders in the matter. The Official Referee does not give judicial decisions on legal questions but goes into the facts after the Judge has decided the rights of the parties in general in order to save the Judges from spending a lot of time over petty details. The Official Referee also holds sales of property in execution of decrees passed on the Original Side of the High Court.

The other two Officers of the High Court are the First and Second Assistant Registrars. They are in charge of the Original Side of the Court and do no Appellate Side work. The senior of the two, the First Assistant Registrar, is also the clerk of the Crown, which means that he is in charge of the Original Side criminal work

and the trial of Sessions cases in the High Court. Every year he prepares the Jury list on receipt of a report from the Sheriff. He issues to the Sheriff the precept signed by the Chief Justice to summon the requisite number of jurors for the next Sessions. He sits in Court during the trial of Sessions cases, reads out the charges to the accused and records their pleas. The First and Second Assistant Registrars divide the civil work on the Original Side between them. The First Assistant Registrar settles the daily cause list, attends to account matters and is in control of the Original Side Establishment. On the judicial side he passes orders on uncontested Execution Petitions, settles sale proclamations, has charge of the taxation work and undertakes the public examination of insolvents. The Second Assistant Registrar is in charge of the Original Side record room, signs decrees, sale proclamations, and so forth and on the judicial side he has the responsible work of passing the accounts of guardians, receivers, trustees and Official Liquidators and of testing security offered to the Court.

Now that I have dealt with the work which the Judges do and the duties which are assigned to the Officers of the Court, I will explain how the High Court office is organised. On the Original Side there is the office of the Clerk of the Crown, which attends to the preparation and publication of the jury list and to other work in connection with the trial of Sessions cases in the High Court. Attached to the Original Side there is also the Interpreters' office. This is in charge of a Chief Interpreter who is responsible for seeing that the Interpreters are sent to the Courts where they are required. The Chief Interpreter knows both Tamil and Telugu, as do the two junior Interpreters. There is a Gujarathi Interpreter for use in cases filed by Marwaris on their accounts which are kept in Gujarathi. There is also a Hindustani Interpreter. All the Interpreters are appointed as Commissioners for Oaths by the Chief Justice and when they are not in Court they spend much of the day explaining affidavits to parties and getting them to swear to them. Almost every petition filed in the High Court is supported by an affidavit in which the facts as alleged by the petitioner are set out. The other side usually files a counter-affidavit, to which the petitioner often files a reply affidavit. Therefore it is greatly to the convenience of the litigants to have in the High Court office persons before whom affidavits can be sworn. The Interpreters do this work. The Master and the Official Referee have attached to them clerks who attend to their Court work and these form part of the Original Side office.

Apart from these small excrescences, the Original Side office consists of two parts, the Original Side proper and the Insolvency Office. The latter is naturally the smaller and is in charge of a Manager. As the name implies, this office deals with all the work arising out of insolvency petitions filed by bankrupts or their creditors. Its work is comparatively simple and consists of keeping registers showing what has happened in the insolvency petitions and of taking proper care of the records in insolvency petitions. It has its own separate record room.

The Original Side office proper is in charge of a Manager. Here again the main work is keeping registers which show clearly and accurately the various proceedings taken on the Original Side. The Court work is in the hands of two Original Side Bench Clerks who are recruited direct from the Bar. The preparation of decrees and orders is attended to by the Original Side Decree Clerk who ranks as a Bench Clerk. The custody and preservation of records are the responsibility of the Original Side Record-keeper. Plaints, written statements, issues, judgments and decrees are kept permanently, but there are a number of other papers which after some years have no real value and these have to be destroyed. To simplify the destruction work it is necessary to maintain an index of the papers in each case. This index is opened as soon as the case is filed and each paper added to the record is numbered and indexed as it is added. When the case is over the papers are divided into three parts, according to the length of time for which they have to be preserved. Then in the course of time they are destroyed.

The Appellate Side is divided into a number of departments and sections whose work has to be co-ordinated by skilful supervision on the part of the heads of sections and the Officers in charge of them. The main division of the Appellate Side is between the Administrative Department and the Judicial Department. Each of these is in charge of a Sub-Assistant Registrar, the highest non-gazetted post in the High Court Service. To put it as briefly as possible, the Judicial Department is concerned with the daily work of the Appellate Side Judges sitting in the High Court while the Administrative Department is concerned with the administration of justice in general, both in the High Court and in the mofussal.

The Administrative Department consists of four sections—the Accounts, Correspondence, Statistics and Budget Sections. They are each in charge of a Head Clerk, though the head of the Accounts Section is called the Head Accountant. The Accounts Section deals with the monetary transactions of the High Court, including the payment of salaries. Until recently only the Suitors' Fund Account was audited by the Examiner of Local Fund Accounts, but now the other important accounts are audited by the Accountant-General and the minor accounts are examined every summer vacation by one of the Vacation Officers.

The work of the other three sections is broadly described by their designations, but in actual practice it is not possible to keep the sections in watertight compartments. They form the Secretariat of the High Court. The Correspondence Section includes amongst its subjects, the posting and promotion of Judicial Officers, the amendment of rules, and most correspondence of a general nature with Government and the lower Courts. To this section is also attached the High Court Librarian. Incidentally, there are two clerks employed in the High Court Library solely on the work of keeping the copies of the Acts of the Central and Provincial Legislatures up to date. As the amendments of the Acts are received it is the duty of these clerks to carry out the corrections in the copies of the Acts kept in the Library and the Courts and note the numbers of the amending Acts in the margin. It is only by this means that the Judges are able to see at a glance not only how the statute law stands at present, but how it stood on any date in the past. The Librarian is of course responsible also for seeing the new editions of important law books are purchased as soon as they are published.

The Statistics Section deals mainly with the returns submitted quarterly and annually by the mofussal civil and criminal Courts with regard to the number of cases instituted, disposed of and pending. From these figures it can be seen whether any Court is falling into arrears and needs relief and whether any officer is not doing a proper amount of work. Annual reports on the administration of civil and criminal justice are submitted to the Government and these are prepared in this section. It also deals with the enrolment of Advocates and allegations of professional misconduct by Advocates and mofussal pleaders. One clerk in the section attends to the distribution of stationery among the departments of the High Court and sends the consolidated indent for stationery required by the lower Courts to the Superintendent of Stationery. All these subjects involve a certain amount of correspondence but the letters are drafted by the section itself and not by the Correspondence Section. At the end of every year this section also prepares the index of the files disposed of duing the year. In consequence it attends to matters connected with the Administrative Record Room of the High Court, in which are kept the disposed of files. These files are arranged and docketted in accordance with the Tottenham system and marked for permanent retention or for destruction after one, five or fifteen years.

The Budget section deals with the finances of the Judicial Department. In addition to the preparation of the budget estimates and the control of the expenditure of the lower Courts, this section deals with proposals for establishing additional Courts and with the expenditure of money by the High Court. It also attends to the letting of the Law Chambers in the High Court Buildings to Advocates.

Attached to the Administrative Department and under the general supervision of the Sub-Assistant Registrar of that Department is the Current Section, which does the typing and despatch work of the whole High Court, though some typists are attached to the Original Side for the sake of convenience. This section makes the fair copies of the letters sent out by the High Court and of the judgments and decrees pronounced by the Judges. It then sees to their signature by the proper officer and to their despatch. In the case of appellate judgments and orders this section has to obtain from what is called the Vernacular Record Room the original records which have been sent up to the High Court by the lower Courts and return them to the proper Courts. The Current Section, of course, receives these bundles of records already tied up and is merely responsible for seeing that they are despatched along with the orders of the High Court in appeal.

The best way to describe the work of the Judicial Department is to explain what happens to the papers in a case from the time the Advocate presents the appeal in the High Court until the case is finally disposed of. After an Advocate has received instructions from a party who is dissatisfied with a decision of a lower Court, he prepares an appeal memorandum setting out the grounds for appealing. He then presents the appeal memorandum with court-fee stamps of the proper value affixed at the Appeal Examiners' Section in the High Court. With the appeal memorandum he has to file as many copies of it as there are respondents in the appeal, copies of the judgment and decree of the lower Court, a form setting out the names and addresses of the respondents who have to receive notice of the appeal and a receipt from the Head Accountant of the High Court to show that he has paid a sum, which varies according to the class of case, for having the essential papers printed. The form giving particulars of the respondents has to have court-fee stamps affixed to it to meet the process fees prescribed for serving notice of the appeal on the other side. The Appeal Examiners receive these papers, number the bundle with automatic numbering stamp and enter the particulars of the papers received in a register against the number with which the bundle was stamped on receipt. The next step is to examine the papers carefully to see whether they are in order—whether, for example, the court-fee payable has been correctly calculated in accordance with the Court-Fees Act, whether all the papers which should accompany the appeal memorandum have been filed, whether the particulars of the respondents are sufficiently clear for notices to be served on them and so forth. This examination work is very important and is done by Appeal Examiners who are almost invariably graduates in law. If there are any defects or omissions in the papers filed, the Appeal Examiners note these on the appeal memorandum and the Deputy Registrar returns all the papers to the Advocate concerned for re-presentation within a certain number of days. When the Appeal Examiners are satisfied that everything is in order, the case is formally taken on file and given a number. The papers are then sent to the filing section, where there are separate clerks for attending to each class of cases. Every day a list of appeals filed is put up on the notice-board. The filing clerks enter particulars of these cases in a register which eventually shows the whole history of the case including the result and the Judges who disposed of it.

The next stage is the admission of the appeal. For this purpose the papers are sent to the Deputy Registrar who either admits the appeal or has it posted before Court or if it is a Second Appeal or Civil Revision Petition circulates the papers for orders to the Judge in charge of the district concerned. After the admission of the appeal, the papers are sent to the Notice Section for the issue of notices to the respondents. The filing clerks also call for the original records from the lower Courts. It is the duty of the filing clerks to watch whether these records are received. On receipt the records go to the Vernacular Record Room where they are checked to see if they are complete according to the index of papers in the case. Therefore the filing clerks go daily to the Vernacular Record Room to see what records have been received the previous day. If records have not been received within three weeks after they have been called for, a reminder goes to the lower Court. If they

are still not received after a further two weeks, a second reminder is issued. If after a further two weeks the records have not arrived a demi-official letter is sent to the Judge presiding over the lower Court calling his personal attention to the delay. These reminders are issued by the filing clerks.

Meantime the notice clerks are attending to the service of notices on the respondents. These notices are sent to the mofussal Courts for service through their process-servers. If however the respondents live in the City of Madras the notices are sent to the Sheriff of Madras for service through his bailiffs. If a respondent cannot be found the notice is returned to the High Court unserved and every day a list of unserved notices is put up on the High Court notice-board with the reason for non-service of the notice. The Advocate for the appellant then has to file a fresh notice with a further process fee within 15 days. The dates on which the respondents are served are noted in the filing clerk's register and when all the respondents in a case have been served it is said to be "ready in notice."

The next stage is the preparation of the record for the Court. In most cases the record is printed, but in recent years there have been 16 Judges working and the Government Press has not been able to print the cases as quickly as 16 Judges dispose of them. Therefore in small cases the parties are encouraged to supply the Court with typed copies of the record, but that is not the normal procedure. Moreover, to save paper, printing in what is called Privy Council form has been given up in the big cases. Formerly in cases where the value of the subject-matter in dispute was over Rs. 10,000 printing was always done in Privy Council form in case there was an appeal to His Majesty in Council. This involved very careful printing work and galley proofs and form proofs were sent to the High Court for proof reading in the Privy Council Section of the Translation and Printing Department. Moreover 55 extra copies were printed for use by the Privy Council. It was found that quite a number of these cases never went to the Privy Council and for the duration of the war no cases are being printed in Privy Council form until an appeal to the Privy Council is actually filed. Such careful printing in Privy Council form is of course necessary because the original records are not sent to London. In the High Court the original records are available for reference in case there is any mistake in copying or printing.

Not the entire record is printed. In most cases the parties only want some of the oral evidence and a selection of the documents filed in the lower Court to be printed for the use of the Judges in the High Court. The judgment of the lower Court is filed with the memorandum of appeal. It is compulsory to print the plaint and written statement filed in the lower Court so that the Judges can know what the pleadings of the parties were. When the records have been received from the lower Court the Advocates appearing for the parties are called upon to point out the portions of the record which they want translated and printed. For this purpose the records are sent to the Translation and Printing Department. When the portions required have been pointed out, the billing clerks estimate as accurately as possible what the cost of translating and printing them will amount to. If this exceeds the deposit paid by the appellant in the first instance at the time of filing the appeal, he is required to pay the further sum due. The respondent has of course to point out any portion of the record on which he relies and which the appellant has not asked to be printed and he is given a bill for printing that portion. The bills have to be paid within 25 days, though the parties can for good reasons get an extension of time to pay the bills by filing petitions before the Deputy Registrar but this costs them certain fees. The parties are entitled to one free copy of the portions which they ask to be printed, but they have to pay for extra copies and for copies of the portions pointed out by the other side.

When the portions to be printed have been pointed out those parts of the record which are in English are sent to the Press Copyists' Section for typed copies to be made. These copies are sent to the Press and not the original documents, which after copying are sent back to the Vernacular Record Room. The Press Copyists'

Section is part of the Translation and Printing Department and is in charge of a Superintendent. The Press Copyists provide their own typewriters and are paid on a piece work basis. It is remarkable how much they can type in a day. Their copies are compared by Readers and Examiners who are usually junior clerks. Those portions of the record which are not in English are sent to the Translators for translation into English. At the present time nearly forty Translators in Tamil, Telugu, Malayalam and Kanarese are employed in the High Court. There are two Superintendents of Translators to distribute the work and check the translations.

When the copies have been made by the Press Copyists and the translations by the Translators, these are sent to the Press Clerks. It is their duty to see that all the records which the parties require to be translated and printed are included in the bundle which they then arrange and index and send to the Government Press. In actual practice the process of preparing the papers for the press is not so simple. Advocates frequently fail to point out the portions they want printed and fail to pay the printing bills in time. Parties die and legal representatives have to be added and they in their turn have to be given an opportunity of having the record printed.

When however the record has been completely printed and all the parties to the case have been served with notices, the case is ready. A list of ready cases is put up on the notice-board daily and parties then purchase the printed papers. When first appeals have been on the ready board for 14 days and other cases for 7 days, they are added to what is called the rough list. From the cases in the rough list the fair list of cases to be heard the following day is selected by the Deputy Registrar. The rough lists and the daily cause lists are maintained by the Chief Posting Clerk.

As soon as cases are put into the ready list, the Vernacular Record Keeper checks the original records to see that they are complete and in order. When the daily cause list is made up the Vernacular Record Keeper has to send the records to the Bench Clerks Department so that they can be taken to the Court for reference by the Advocates and Judges if necessary. The cases taken from the rough list are usually the oldest cases of their class, though some cases are taken up out of turn because it is necessary to expedite the hearing of them. The cases for hearing the next day are selected only in the afternoon when the Deputy Registrar has seen how far the Judges have proceeded with the cases already posted before them. It is therefore essential that the Vernacular Record Keeper should have the original records ready to send to the Courts without delay. The daily cause lists are printed every afternoon by a section of the Government Press working in the High Court Buildings, and these lists are distributed by contractors the same evening to the Advocates—about 400 of them—who subscribe for them. By this means the Advocates know which of their cases will be taken up the following day.

At the actual hearing of the cases in Court, the Bench Clerks have custody of the papers—the printed papers and the original records. They arrange to have the law reports ready for the Judges' reference. They are responsible for the law books kept in the almirahs in the Courts allotted to them. Judgments are always pronounced in open Court—usually as soon as the arguments on both sides are finished. The judgments are taken down by short-hand writers, who form a section of the High Court office and work under the supervision of a Manager. If a Judge reserves judgment a short-hand writer goes to the Judge's house to take down the judgment and after it has been transcribed the judgment is read by the Judge in Court. The result of each case is noted by the Bench Clerk in the daily cause list.

The next stage is the preparation of the formal judgment and decree. This is done in the Bench Clerks Department which is in charge of a Manager. Some Bench Clerks work in the Courts while others attend to the work of preparing the decrees on the basis of the judgments. There are also clerks who are called drafters

to attend to the easier cases and do routine work. At the time of putting up the formal judgment and decree to the Deputy Registrar for his signature, the Bench Clerk has to note on it whether an extra copy of the judgment should be typed for the Law Reporters. This is always done in important or unusual cases. There is the Government publication, the Indian Law Reports, Madras Series, which is in charge of the Editor assisted by three Reporters, who work in the High Court, but not under the Registrar. There are also non-official publications such as the Madras Law Journal. Before any judgment is reported in any of these publications the permission of the Judges concerned is obtained.

When the formal judgment and decree have been approved by the Deputy Registrar or Assistant Registrar, copies are made in the Current Section and sent to the lower Courts with the original records from the Vernacular Record Room. The printed papers, with the original judgment signed by the Judges and the draft formal judgment and decree are sent to the English Record Room where they are retained for future reference. It is from the English Record Room that the High Court Judgments are obtained for granting copies to the parties. These are certified copies made on copy stamp papers by what is called the Stamp Copyists Department.

The procedure which I have described applies to civil appeals. The procedure in criminal cases heard on the Appellate Side of the High Court is similar but simpler and all the work, except the translation and copying is done in a special section called the criminal section.

It has not been possible, even in a lecture of this length to enter into all the details of the administration of the High Court or to explain how all the interesting administrative problems, such as the co-ordination of the work of the various sections, are solved so that unnecessary delays may be avoided. As the present Chief Justice, the Hon'ble Sir Lionel Leach, emphasised in a recent speech, "Justice delayed is often Justice denied." It is easy in an office of the size and complexity of the High Court for delays to occur without any particular person being really to blame, but if that watchword is always kept in mind and common sense is applied to each problem as it arises there is no reason why the administration of Justice in the High Court should not proceed smoothly and efficiently. In fact, if I may be allowed to make what is possibly a dangerous generalisation, all problems of public administration can be solved without much difficulty merely by the application of common sense. That at any rate has been my experience in the High Court.

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ON DEMAND MORTGAGE BONDS—LIMITATION

BY

M. VELAYUDHAN NAYAR, B.A., B.L., ALATUR.

A recent Full Bench decision, *Venkitaswami Chetty* v. *Ramalingam*[1], lays down that when a mortgage bond provides that the mortgage money shall be payable 'on demand' the money becomes payable at once and limitation starts from the date of the bond and not from the date of demand by the mortgagee for the amount.

It is submitted that the Full Bench decision is opposed to the Privy Council decision in *Nilkanth Balwant Natu* v. *Vidya Narasinh Bharati Swami*[2], where the point directly fell to be decided. The action in the Privy Council case was for recovery of the mortgage amount by sale of the mortgaged properties. The mortgages sued on were executed between the years 1840 and 1844. Under the mortgages it was agreed to pay interest on the mortgage amount at the rate of twelve annas per cent. per mensem, and for the repayment of the debt four inam villages of the mortgagor were mortgaged and the total revenue of the four villages were assigned in mortgage to the mortgagee. The deed contained certain clauses as to management of the mortgaged properties. It was found that the mortgagee or his successor-in-interest actually went into possession of the mortgaged properties and received the rents and profits therefrom. It was established, however, that after 1859, the mortgagee did not collect the rent of the mortgaged properties. The mortgagors contended that the suit was barred by limitation. It was argued on their behalf that the cause of action arose in 1859 or 1860, when the plaintiffs' predecessors ceased to be in possession of the mortgaged properties, that the Limitation Act No. XIV of 1859 was then in force and that by reason of section 1 (16) the suit was out of time in as much as it should have been brought within the period of six years from the time the cause of action arose. Reliance was also placed upon Article 132 of the Limitation Act of 1871 which is in terms similar to Article 132 of the Limitation Act of 1908. The Privy Council rejected the plea of limitation raised by the mortgagor-defendants and the plaintiff was given a decree for sale of the mortgaged properties. The Privy Council observed as follows:

"In the first place the plaintiffs or their predecessors were not bound by the terms of the mortgage to enter into possession of the mortgaged properties and to apply the rents and profits towards the payment of the debt, though they had the power to do so; and the mere fact that the mortgagee permitted the mortgagor to receive the rents and profits in and from 1860 did not give rise to a cause of action."

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1. (1945) 1 M.L.J. 238.
2. (1930) 59 M.L.J. 379: L.R. 57 I.A. 194: I.L.R. 54 Bom. 495 (P.C.).

"In the second place" their Lordships observe—and this seems to be the *ratio decidendi* of the decision :

" there was no specific time fixed for the repayment of the debt, and their Lordships are of opinion on the facts of this case, that the money did not become due and the cause of action did not arise until demand for the payment of the mortgage debt was made by the mortgagees and it was refused by the mortgagor. Their Lordships' attention has not been drawn to any evidence of any such demand and refusal prior to the institution of the suit and the filing of the written statement by the defendants. Consequently they are of opinion that the suit is not barred by limitation."

It is clear that the mortgage bonds in the Privy Council case were on-demand bonds. There was no demand and refusal prior to suit and in the view which the Privy Council took, no question of limitation could possibly arise. Evidently the Privy Council treated the suit itself as a demand for the mortgage money.

This Privy Council decision seems to be directly in point. It looks as if this important pronouncement of the Privy Council was not brought to the notice of the learned Judges of the Full Bench.

The decision of the Privy Council in *Nilkanth Balwant Natu* v. *Vidya Narasinh Bharati Swami*[1], is in consonance with the law as stated by the Madras High Court in *Swami Rao* v. *Official Assignee, Madras*[2]. In the latter case it was held that the words " on demand " or words of similar import when they occur in a mortgage bond should be understood as making a demand necessary for the mortgage money to become payable and that time runs from the date of the demand. The Full Bench distinguish this case as not being one dealing with a plea of limitation and as one dealing merely with the effect of a plea based on Order 2, rule 2, Civil Procedure Code. The Court was no doubt dealing with a plea in bar of Order 2, rule 2, but as the learned referring Judges Wadsworth and Patanjali Sastri, JJ., observe, the point turned on whether the principal amount had ' become due ' when the prior suit for interest alone was filed and the decision is directly in point. The mortgage bond contained a covenant for payment of interest by the 5th of every month besides providing that the principal and interest shall be paid whenever demanded. The learned Judges (Coutts-Trotter and Krishnan, JJ.) held that a demand was necessary before the mortgage money became payable and no demand having been made before the institution of the prior suit, Order 2, rule 2 did not apply. The following observations of Justice Krishnan are apposite :

" It is quite clear that here we have two independent covenants and it leaves it open to the mortgagee to call in his mortgage money whenever he likes or to leave it under mortgage with the mortgagors, but the right to get interest every month is specifically provided for and requires no demand whatever, for interest is payable independently of demand on the 5th of every month . . . . No demand was necessary to bring a suit for interest."

The learned Judges held that on the date of filing the first suit for interest alone the principal amount of the mortgage money had not become due, the mortgagee not having exercised his option of calling it in.

The learned Judges of the Full Bench refer to two decisions—*Kamalambal* v. *Purushotham Naidu*[3], and *Balasubramania Chetty* v. *Manicka Chetty*[4]—apparently as supporting their view. The former is not very helpful. The learned Chief Justice *assumed*, that being an on-demand bond, limitation began to run from the date of the execution of the mortgage bond. Apparently the point was not disputed or challenged by the plaintiff-mortgagee and the judgment contains no discussion. The argument urged on behalf of the defendant was only that because the mortgage document contained a provision for giving three months' notice for exercising the power of sale as provided in section 69, sub-clause 2 of the Transfer of Property Act, the cause of action arose only on the expiry of the three months of giving the requisite notice. His Lordship took the view that the provision regarding the giving

1. (1930) 59 M.L.J. 379 : L.R. 57 I.A. 194 : I.L.R. 54 Bom. 495 (P.C.).
2. (1925) 49 M.L.J. 474 : I.L.R. 48 Mad. 703.
3. (1934) 67 M.L.J. 499.
4. (1938) M.W.N. 113.

of notice before exercising the right of sale did not create a condition precedent at all to the claim for money, but merely referred to the exercise of the power of sale which the mortgagee has. The money must be claimed within the period of limitation which according to His Lordship commences from the date of the bond, but the power of sale is not to be exercised until the statutory notice is given and there has been a default to comply with it. The decision in *Balasubramania Chetty* v. *Manicka Chetty*[1] far from supporting the view taken by the Full Bench lays down that limitation in the case of a mortgage document where the provision is to pay the amount on demand commences only from the date of demand. In that case, the plaintiff sought a personal decree for Rs. 16,000 against his mortgagors. The covenant in the mortgage deed was to pay the mortgage amount on demand. The mortgage deed was dated 23-10-1925. The mortgagee made a demand for the amount by a notice on 4th August, 1933. The suit was filed on 14-8-1933. It was held that the suit was not barred by limitation, as limitation commenced only from the date of demand.

The Privy Council decision in *Lasa Din* v. *Mt. Gulab Kunwar*[2], to which reference is made by the Full Bench does not seem to be relevant or helpful in considering the point in question. The mortgage bond in that case was not an on-demand bond. In that case the principal money was payable at the end of six years, but there was a clause which empowered the mortgagee to claim the principal and interest before the expiration of the stipulated period, in default of payment of interest annually. No interest was ever paid under the mortgage and the mortgagee brought a suit to enforce his security within 12 years from the expiry of the stipulated period (six years), but more than 12 years from the default in the payment of interest. It was held that the provision in question was inserted in the mortgage deed for the benefit of the mortgagee and gave him an option either to enforce his security at once on default by the mortgagor in the payment of interest or to wait for the full term of the mortgage. If the mortgagee did not exercise the option the money secured would become due only at the end of the stipulated period.

The decision of the Madras High Court in *Secretary of State* v. *Radhika Prasad*[3] is very instructive in regard to understanding the correct import of the words "on demand" when used in mortgage bonds and other documents. The learned Chief Justice observed as follows:

> "According to the law of England when money is payable on demand and nothing further is said it is payable at once and without demand; and time under the Statute of Limitation begins to run at once. The most common instances of the application of that principle are of money lent repayable on demand or at request and promissory notes payable on demand (*Norton* v. *Ellam*).[4] It is worth noticing that the principle of the English Common Law has been held not to apply to cases in the moffussil—*Tarinee Parsad* v. *Pran Kishen Banerji*[5]. However, the principle is in terms applied by articles 59 and 73 of the Indian Limitation Act to cases of money lent and bills of exchange and promissory notes payable on demand. But it is not extended to any other case."

The action in the case in *Secretary of State* v. *Radhika Prasad*[3], was based on a promissory note payable on demand; nevertheless their Lordships held that Article 73 of the Limitation Act was not applicable to the case, because the so-called promissory note was not a promissory note within the definition of the Limitation Act and therefore the amount did not become due until after demand and the suit was not barred by limitation.

The Indian Legislature has applied the technical or common law meaning of the words "on demand" (forthwith, immediately) only to the two classes of cases mentioned in Articles 59 and 73 of the Limitation Act. In all other cases, whenever money is payable on demand, it is payable only on demand; in other words, the words "on demand" are not mere words, but constitute an important term of the contract and a demand should be made before the liability arises and limitation

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1. (1938) M.W.N. 113.
2. (1932) 63 M.L.J. 187 (P.C.).
3. (1922) 44 M.L.J. 685: I.L.R. 46 Mad. 259.
4. 2 M. & W. 461.
5. 14 Suth. W.R. 224.

would commence only from the date of demand. *Cf.* the starting point mentioned in column 3 of Articles 59, 60 and 73 of the Limitation Act. It will be observed that in all these three articles, the words "on demand" occur. Article 59 relates to suits for recovery of money lent under an agreement that it shall be payable on demand. Article 73 relates to suits on bills of exchange or promissory notes payable on demand. Article 60 relates to suits for money deposited under an agreement that it shall be payable on demand including money in the hands of his banker so payable. It will be observed that although money is payable only on demand under the terms of the contract, the starting point of limitation in cases falling under Articles 59 and 73 is the date of the loan or the bill or promissory note as the case may be, while the starting point in cases falling under Article 60 is only the date of demand and not the date of the deposit or loan.

Under the Limitation Act of 1859, the starting point of limitation for suits for the recovery of money lent was the date when the debt 'became due.' It was held in some cases which arose under that Act that where money was payable on demand, the technical meaning of the words "on demand" in the English Law did not apply to the mofussil in India and that an actual demand was necessary before the debt could be said to become due. *Tarinee Parsad* v. *Pran Kishen Banerji*[1]. The Limitation Act of 1871 gave effect to this view by providing both in article 58 (present article 59) and in article 72 (present article 73) that limitation begins from the date of demand. But the Act of 1877 adopted in articles 59 and 73 (corresponding to articles 59 and 73 of the Act of 1908) the technical or common law meaning of the words "on demand" (forthwith, immediately) when used with reference to debts and it was provided that time began to run under these articles from the date of the loan or the bill or promissory note.

It is submitted that the Full Bench decision requires re-consideration.

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1. (1870) 14 Suth. W.R. 224 : 6 Beng. L.R. 160 (D.B.).

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THE BILL TO AMEND THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT.

This Bill has not unnaturally evoked great opposition from all quarters. Apart from the objections to the Bill on the merits, it is a serious objection to the Bill that it is intended to be passed by a legislative machinery not intended to be used for ordinary legislation, much less to a legislation of this character. Popular legislature is about to be convoked and it will soon be functioning. The amendments proposed to be enacted are such that only a people's legislature, fully conversant with the functions which these institutions perform and the social purposes they fulfil, can deal with satisfactorily. There is no immediate need or urgency to bring the proposed amendments into force, before the legislature meets after the forthcoming elections.

It is, in my opinion, an initial mistake to have included mutts and temples in the same legislation. They are wholly unlike in their nature and constitution, notwithstanding that they may be said to serve same or similar purposes. There is little in common between the head of a mutt and the trustee of a temple. Brought together in one Act, and conceived, as they are, as alike in their nature and purposes, successive amendments are made so as completely to assimilate them and then we wake up to the initial mistake and its consequences. This, as any one can see, is exactly parallel to the other error of dealing with zemindaris and inams in the same Act and the slow process of amending legislation assimilating them and showing up the disastrous consequences of the initial error.

Executive action needs judicial check. Its availability will keep the executive within the law. Recent experience has shown that the existence of writs of certiorari makes extensive resort to them unnecessary. If questions such as have had to go to the High Court in the past are to be withdrawn from it, there must be other equally efficient machinery to deal with those questions. Appeals to departments of government will not do. If the idea is that these matters should be dealt with by a tribunal consisting of Hindus only, either a bench of the High Court consisting of Hindu Judges or a special tribunal of quality should be constituted before the jurisdiction of the ordinary courts is taken away. As far as I can see at present, retention of the jurisdiction of the ordinary courts may still be necessary for many purposes. I will not now say more than that it may require careful examination by a popular legislature.

T. R. Venkatarama Sastri.

THE BILL FURTHER TO AMEND THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, 1926.

BY

K. BALASUBRAHMANIA AYYAR, B.A., B.L.

It is proposed to pass this Bill as an Act in exercise of the powers given to the Governor under section 93 of the Government of India Act. Under clause (4) of the said section, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the proclamation ceases to have effect. Now, the General Elections will be held soon and popular Ministries will begin to function early in the course of next year and the section 93 administration will necessarily cease. It is indeed, very strange that it is now proposed to enact a temporary measure like this which contains provisions of a very controversial nature and proposes changes of a far-reaching character, altering in some respects some of the main principles upon which the original legislation relating to Hindu Religious Endowments was passed. The Legislative Assembly has been formally dissolved and the whole country is busy with the coming elections with a view to elect fresh members for constituting the new Legislative Assembly. When the public mind is engrossed with the elections, it is unjust and improper to propose the enactment of a measure at this juncture which deals with a subject eminently fitted to be dealt with only after a deep consideration of the views of the representatives of public opinion and after a thorough discussion and examination of the changes involved in the proposed measure by the elected representatives of the people truly reflecting public opinion on a matter of vital concern to them. Even the time allotted for eliciting public opinion is very short. The new Bill has not been translated into the vernaculars.

A perusal of the Bill will convince any one that the changes proposed in the Bill are of a vital and far-reaching character and are calculated to evoke the strong criticism of the public. The report of the Venkataramana Rao Committee appointed for investigating the changes that may be necessary has not been published and the public are not in a position to know the reasons which call for the introduction of these amendments to the Act. Last year when Act V of 1944 was passed, it was stated to be a non-contentious measure and some proposals relating to audit which were likely to evoke controversy were dropped. The cardinal principle of the original Act was to deal with Mutts and excepted Temples in a manner quite different from other religious endowments. They were dealt with therefore under a separate chapter, Chapter VI. This difference was made by the Legislature only on account of a due regard to the nature and purpose of Mutts and excepted Temples. Mutts in Southern India are religious foundations established for the preservation and promotion of the tenets and branches of the various religious persuasions of the Hindu Community. They were founded by great teachers known as Acharyas who were also founders of those creeds of the Hindu Community such as the Advaita System, the Vaishnavite System consisting of the two sects Vadagalai and Thengalai, the Madhva System and the Saiva Siddhanta System and Saivaite faith. The Heads of these Mutts are generally ascetics who are men of great piety and learning and who command reverence from the members of the particular sects to which they belong and also from the general Hindu public. They have numerous disciplies among the members of the sect who owe spiritual allegiance to them. The law relating to these Mutts has been clearly laid down by important decisions of the Privy Council and the High Courts in India. The heads of these Mutts are not trustees in the strict sense of the Indian Trusts Act but they have large beneficial interest in the income of the properties of the Mutt and in the offerings given to them by their numerous disciples out of religious motives or spiritual allegiance to them. In the decision of the Madras High Court reported

in I.L.R. 27 Madras, 435, two very eminent Judges Sir S. Subrahmania Ayyar and Sir V. Bhashyam Ayyangar who were fully conversant with the religious usages of the Hindu Community observed as follows:

SUBRAHMANIA AYYAR, J.—"The Swamis were not mere employees or subordinates in the Institution, but heads thereof, whose duty it was to promote learning and further the interests of religion; such heads, moreover, as ascetics not prone to be affected by motives incident to wordly life, requiring less restraint in dealing with the property than ordinary men. It followed therefore that the law gave them over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the *corpus* it treated the individuals composing the line of succession as in the position of tenants for life."

SIR V. BHASHYAM AYYANGAR, J.—"A large part of the income derived from the endowments of the Mutt as well as from the money offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the Mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law."

This decision was approved by the Judicial Committee in the judgment of Lord Shaw reported in I.L.R. 45 Madras 565, in which His Lordship observes as follows:

"The position of dharmakartha is not that of a shebait of a religious institution, or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character . . . . . . In the very learned judgments delivered in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirtha Swami*[1], the distinction between those functionaries is explained."

In the case of the excepted Temples also, the original Act had due regard to the fact that these Temples were practically founded by princes and noblemen and zamindars and other rich men and their management continued in the family of the original founders. In many cases of these excepted Temples the endowed properties are much less in proportion to the amounts contributed from time to time by the hereditary trustees themselves. Therefore it is that the original Act contented itself with the enactment of a general provision that the head of a Mutt or the Trustees of an excepted Temple should submit a budget showing the probable receipts and disbursements and a statement of the annual receipts and expenditure of the previous year. The Act gave power to the Board to settle a scheme only in cases of mismanagement or spending or alienating the properties for improper purposes or when there was a public demand for such a scheme. The new Amendment Bill, in utter violation of the principles of law enunciated above, on the other hand, proposes to introduce provisions for a regular daily control of these Mutts by the Board or the Assistant Commissioners, as the case may be, by a system of concurrent audits, annual audits and audits at shorter intervals by a staff of auditors appointed and controlled by the Board.

It is further proposed to give power to the Board to appoint Executive Officers who will share with the heads of these Mutts all the powers entrusted to them, power to surcharge the heads of the Mutts or the Trustees of excepted Temples on the basis of the audit reports without the safeguard of a scrutiny by Courts,

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1. (1904) 14 M.L.J. 105: I.L.R. 27 Mad. 435.

the only appeal against the decision of the Board being to the Provincial Government *i.e*,, from one executive head to a superior executive head and also to appoint interim heads of Mutts pending a scheme. Power is also given to the Board to make suggestions in regard to various items in the budget of these Mutts and the surplus. Though the Bill mentions suggestions, one can very well imagine that these coming from a body which has assumed so much control over these Mutts and excepted Temples can only be regarded as directions which must be strictly obeyed by the head of the Mutt or the trustee for fear otherwise of disfavour and other consequences. These bills fetter unduly the absolute powers of disposal and discretion of the heads of Mutts and impose galling restraints on their dignity and status. The restraint sought to be imposed on the powers and discretion of the heads of these Mutts is fundamentally opposed to the very spirit of these religious foundations and will greatly hamper their usefulness in the promotion and propagation of the religious tenets of the sect for which these Mutts have been founded. In fact, they are reduced to the position of subordinates of the Board and subject to their strict supervision. The Hindu community cannot, without its religious sentiment being severly affected, acquiesce in giving to the Board such a position of preeminence over all these heads of Mutts.

It will be clear from the resume that I have given of some of the provisions that the amendments proposed are of far-reaching character likely to evoke strong public criticism and deeply affecting the sentiment of the Hindu community. I am not suggesting that the administration of the Mutts in all cases has not been sometimes open to criticism or there have not been cases of mismanagement, but there is ample remedy under the present Religious Endowments Act itself for rectifying such mismanagements. The changes proposed are quite out of proportion to the needs of this object. On the other hand, they may prove harmful to the interests of these foundations and will impair the reverence with which the heads of the Mutts are held by the Hindu Community. As has been remarked by that eminent Judge, the late Justice Subrahmania Ayyar, in I.L.R. 27, Madras, 435, " even now the heads of some of these Mutts enjoy the esteem of the community and continue to serve more or less the purpose intended". But, it may be said without fear of contradiction or exaggeration that the heads of some of these Mutts of the present day are persons of great austerity, learning and nobility of character and command the reverence and spiritual allegiance of millions of the Hindu Community.

The Bill further discloses an unjustified distrust of the jurisdiction of the Civil Courts and substitutes ' applications ' for suits in many cases and debars appeals to Civil Courts and makes the orders of the Board final. To entrust the Executive with judicial functions without subjecting them to the scrutiny of Civil Courts is opposed to the principles of jurisprudence of all civilized countries.

It is hoped, therfore, that His Excellency will be pleased not to take the responsibility for passing such a measure which contravenes the just and sound principles of law and legislation and is in violation of the religious sentiments of the Hindu Community and will drop the Bill altogether.

SUMMARY OF ENGLISH CASES.

Re BLAKE, CLUTTERBUCK *v.* BRADFORD, (1945) 1 All.E.R. 1.

Solicitor's lien—Order for "costs" in favour of client against opposite party—"Costs" is property recovered through instrumentality of the solicitor who is entitled to a charging order over the "costs."

In a case where no question of conduct of the solicitor is involved it would require very exceptional circumstances to justify the Court in refusing to the solicitor the security in respect of the fruit of his labours. The hardship to other parties whose claims against the client may be postponed is not a sufficient ground for the Court to refuse to exercise its discretion to make a charging order in favour of the solicitor. An application by a solicitor for a charging order in a case where the judgment is merely a judgment for costs is perfectly competent. Even where the order was only for payment of costs to the client, the solicitor is entitled to a charge on those costs as being "property recovered" through his instrumentality.

Dallow v. *Gerrold,* 14 Q.B.D. 543, relied on. *Higgs* v. *Higgs,* 103 L.J. P. 44=150 L.T. 516, overruled.

No distinction can be suggested between an order for costs in an originating summons for construing a will and any other order for costs.

TRINIDAD LAKE ASPHALT OPERATING CO., LTD. *v.* INLAND REVENUE COMMISSIONERS, (1945) 1 All.E.R. 9 (P.C.).

Income-tax—Company—Dividend paid to foreign company by cancellation of credit due to such foreign company—If "transmission" of income—Liability to tax—Trinidad and Tobago Income-tax Ordinance (1940), section 30.

Where a company situate within the territorial jurisdiction of a colony sets off the dividend payable by it to a foreign company holding shares in it against the cost of goods supplied to that foreign company the transaction involves the "transmission" of the dividends to the non-resident share-holder company by the resident company with the consequence that it becomes liable as statutory agent of the foreign company for the amount of the income-tax.

ARISTOC LTD. *v.* RYSTA, LTD., AND ANOTHER, 1945 A.C. 68 (H.L.)=(1945) 1 All. E.R. 34.

Trade Marks—"Rysta" and "Aristoc"—Resemblance in sound—Trade mark in respect of repairs to stockings not of own manufacture—If can be registered—Trade Marks Act, 1938.

The appellants carried on business as manufacturers of and dealers in, women's stockings. They adopted the invented word "Aristoc" as a trade mark in the year 1923 and sold silk stockings of their manufacture throughout the United Kingdom. They were registered proprietors of some 24 registered trade marks consisting of the word "Aristoc" alone or having that word as the most important and prominent feature. The respondents carried on business since 1929, but they neither made nor sold any stockings. They were the owners of an undisclosed process for effecting invisible repairs to ladies' stockings by catching up the broken threads which caused ladders therein, and this they called "the "Rysta" process. In 1938, the respondents filed their application to register the word "Rysta" as a trade mark in respect of "stockings and re-weaving repairs effected thereto", the mark being used by them.

Held, (1) the word "Rysta" was likely to cause confusion having regard to the existence of the appellants' trade mark "Aristoc" which it so nearly resembled; (2) the use of the mark both on stockings intended to be manufactured as well as those repaired by the respondent will cause confusion and deception; (3) a registrable trade mark must be an indication of origin of the goods or their character or quality. The repair of stockings does not constitute a "connection in the course of trade" and a trade mark merely to indicate that stockings have been repaired by the person claiming registration of the trade mark, cannot be accepted for registration.

CUTLER *v.* WANDSWORTH STADIUM, LTD., (1945) 1 All.E.R. 103 (C.A.).

Undertaking in lieu of injunction—Variation—Procedure for obtaining.

The Court does not vary an undertaking given by a litigant. If a litigant has given an undertaking and desires to be released from that undertaking the application should be an application for release supported by evidence showing why the litigant should be released from the undertaking which he has given. Where an undertaking was given until the trial of the action or further order, an order of the court is necessary before the giver of the undertaking could be released. Litigants are not ordered to give these undertakings; they choose to give them, and an application to have an undertaking already given varied is wholly wrong in form. In an application to release a litigant from the undertaking given by him, it is not enough merely to rely on the fact of effluxion of time since the delivery of the statement of claim, nor is it enough to rely on the fact that the Court of Appeal in another action has taken the view that an injunction granted in that action (similar to the undertaking) was granted in too wide terms.

NORAH READ v. J. LYONS & CO., LTD., (1945) 1 All.E.R. 106 (C.A.).

Tort—Factory manufacturing high explosives—Bursting of shell—Injury to employee—Liability.

The manufacturer of explosives, which he knows to be dangerous, is under a duty to take a high degree of care, but if he fulfilled that duty, he would not be liable to any person using his premises for the consequences of an accidental explosion. The doctrine of strict liability laid down in *Rylands* v. *Fletcher*, (L.R. 3 Ch. 330) has no application to accidents incidental to the process of manufacture occurring to persons present on the premises whether as servants or as invitees or licensees. (American and English principles compared and fully discussed). (1944) 2 All.E.R. 98, reversed.

BRILLIANT v. MICHAELS, (1945) 1 All.E.R. 121 (Ch.D.).

Lease—Payment of advance for rent and cost of decoration of premises, tenancy agreement to be executed in due course and possession to be taken when premises became vacant—Agreement if enforceable—Rent agreed o higher than standard rent—Effect.

In return for an advance made by *B* the plaintiff the defendant gave a receipt as follows: "Received of *B* . . . . the sum of £ 5 deposit on flat no definite date for possession. £ 70 to be paid for decoration on completion of work at the rate of £ 3-5s. per week payable monthly in advance. Rent to be worked out according to monthly payments. Agreement to be signed by above tenant for three years. Agreement £ 2-2s. and stamp duty five shillings. Deposit to be returned if required." When the premises became vacant the defendant refused to let it to the plaintiff. In an action by the plaintiff for specific performance the defence raised was (1) that there was no firm contract ever made; (2) that if there was any agreement such agreement was not enforceable at law or equity by reason of the absence of any date or any sufficiently ascertained date for the commencement of the proposed term; and (3) that there was no sufficient memorandum in writing of the alleged contract to satisfy the Law of Property Act (1925), section 40.

Held, (1) that there was no final and binding contract of tenancy; there was only a contract to make a contract: (2) Assuming that there was a contract, a contract for a lease is enforceable notwithstanding that the commencement of the term may be expressed by reference to the happening of a contingency which is at the time uncertain provided that, at the time that the contract is sought to be enforced, the event has occurred and the contingency has happened. (3) If two parties agree that one is to pay and the other is to receive a rent in excess of the so-called standard rent neither that part of the bargain nor the whole contract is thereby rendered illegal. The fact is that in so far as the rent inserted or agreed upon is in excess of the standard rent the excess is not recoverable at law. It may not be right to grant a decree for specific performance with such a term as to rent in the agreement.

MARCO PRODUCTIONS, LTD. v. PAGOLA AND OTHERS, (1945) 1 All.E.R. 155 (K.B.D.).

Practice—Injunction—Contract of personal service—Enforcement—Restrictive covenants—Breach of—Proof that damage will result not essential for grant of injunction restraining breach.

The defendants entered into a contract with the plaintiff company, (theatrical producers) whereby "during the engagement or any time prior" in the company's theatrical productions at Oxford for the particular season, they would not appear "in any other entertainment . . . . without the written consent of the company." The defendants having contracted to appear for another theatrical producer at Manchester for the relevant season the plaintiff company asked for an injunction restraining the defendants from committing breach of the covenants.

Held, (1) Though the words in the covenant "or any time prior" were unnecessarily wide and unenforceable they were severable from the rest of the covenant which was valid. (2) It is not essential for the plaintiff to prove that damage will result by breach of the restrictive covenant and the defendants can be restrained by injunction. (3) The injunction would not have the effect of compelling the defendants to perform their positive obligations.

JONES v. LOWE, (1945) 1 All.E.R. 194 (K.B.D.).

Agent—Agreement to pay commission on introducing a purchaser—Agent when entitled to commission.

Where a person chooses to say "My commission will be payable on my introducing a purchaser" he must be construed as saying "My commission will be payable only when some one I introduce has purchased." Unless the person introduced has got so far as to signing a binding contract of purchase and sale the agent is not entitled to the commission. Nor has he a claim on *quantum meruit* in the absence of a stipulation to pay reasonable remuneration for the service.

ALDERSLADE v. HENDEN LAUNDRY, LTD., (1945) 1 All.E.R. 244 (C.A.).

Contract—Bailment—Laundry—Clause in contract limiting liability for lost or damaged article to 20 times the laundering charge—Applicability to loss of article by negligence—Duties of launderer.

The terms upon which a laundry company accepted its customers' goods included a clause "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering." The company relied on this clause for the purpose of limiting its liability to the plaintiff in respect of certain hand-kerchiefs which he had sent to be laundered but which were not returned to him. The plaintiff contended that the clause was not applicable so as to exclude loss by negligence

in the absence of clear words referring to nelgligence as the loss cotntemplated may be due to mere breach of contract.

Held, the clause does avail to protect the laundry in respect of liability for negligence which must be assumed to be the cause of these hand-kerchiefs having disappeared. The obligation of the laundry is in addition to launder to take reasonable care of the articles before and after washing.

DAVIES *v.* COLLINS, (1945) 1 All.E.R. 247 (C.A.).

Contracts—Personal contract with dyer and cleaner—Clause limiting liability for loss to 10 times the charges—Article sent to a sub-contractor and lost—Liability.

The respondent entrusted some uniform to the appellant in order to have it cleaned and some small repairs done upon it. One of the conditions was :—" Whilst every care is exercised in cleaning and dyeing garments, all orders are accepted at owner's risk entirely and we are unable to hold ourselves responsible for damage, shrinkage, colour or defects developed in necessary handling. The proprietor's liability for loss is limited to an amount not exceeding 10 times the cost of cleaning." The appellant farmed out the contract to a sub-contractor and the uniform was lost and not returned.

Held, in the circumstances of the case the appellant must be construed to have undertaken to do the work on his own premises by his own servants and excludes any right on his part to get the work done by a sub-contractor. The loss in the case would not be covered by the limitation clause.

Re ALFRED FOUD, (1945) 1 All.E.R. 288 (Ch.D.).

Will—Construction—Bequest of residuary estate among voluntary hospitals—" Dispensary " is not a hospital.

The residuary estate was directed to be held in trust for division equally among the voluntary hospitals of Birmingham and Solihall. On a summons by a dispensary to include it as a participant in the trust.

Held, " Hospital " signifies a building where inpatients are received and a " dispensary " which gives occasional medical or surgical aid cannot be called a hospital.

NORMAN *v.* GOLDER (INSPECTOR OF TAXES), (1945) 1 All.E.R. 352 (C.A.).

Income-Tax—Medical expenses—Assessee not entitled to deductions for, as money laid out for purposes of the profession or vocation.

It is quite impossible to argue that a doctor's bills represent money wholly and exclusively laid out for the purposes of the trade, profession, employment or vocation of the patient. They are laid out in part for the advantage and benefit of the tax-payer as a living human being in the same way as for food or clothes. Nor can the tax-payer claim deduction for such expenses as wear and tear which refers only to plant or machinery and not to human beings.

SPOFFORTH AND PRINCE *v.* GOLDER (INSPECTOR OF TAXES), (1945) 1 All.E.R. 363 (K.B.D.).

Income-Tax—Firm of chartered accountants—Costs of defending partner in criminal proceedings—Deduction against profits not permissible.

Costs incurred in defending one of the partners of a firm of chartered accountants against criminal proceedings are not deductible from the profits of the firm as they could not be said to have been wholly and exclusively laid out or expended for the purposes of the firm's profession.

EDE (INSPECTOR OF TAXES) *v.* WILSON AND CORNWILL, (1945) 1 All.E.R. 367.

Income-Tax—Shares allotted to company officials as bonus at par value—Shares not saleable without directors' permission—Difference between par value and market value—Liability to tax as gain from office.

The assessees who were company officers were allotted bonus shares at par value subject to the condition that they should not sell them without obtaining the permission of the directors.

Held, that the difference between the par value of the shares and their market value must be treated as gain or profit arising from the office and as such was assessable to income-tax.

HENDERSON SHORT *v.* MCILGROM (INSPECTOR OF TAXES), (1945) 1 All.E.R. 391 (K.B.D.).

Income-Tax—Fee paid to employment agency for obtaining employment—Not deductible from emolument a money " wholly exclusively and necessarily " spent in the performance of the employment.

Money expended in order to obtain employment cannot be said to be spent in the performance of the duties attached to the employment and cannot be deducted from the emoluments of the employment for purposes of assessment to income-tax.

HOPWOOD *v.* MUIRSON, (1945) 1 All.E.R. 453 (C.A.).

Slander—Statement about testimonial given by solicitor in personal capacity—Not actionable per se.

A prospective tenant took a reference from *H*, a solicitor to the landlord. The landlord who had some ill-feeling towards *H* said: "You have got one [that is a reference] from that pimp *H*. It is quite worthless. His very calling as a solicitor makes him write whatever suits his client best. Damn it, he would sue his grandmother for *7s. 6d.*" In an action by the solicitor for slander,

Held, that the statement was a slander on the solicitor as a man and not in the way of his profession and it was therefore not actionable *per se*.

Re WARDEN AND HOTCHKISS, LTD., (1945) 1 All.E.R. 507 (C.A.)=1945 Ch. 270.

Company—Meeting—Service of notice on members with registered addresses in Africa—Not essential—Validity of resolution passed in the meeting.

Uthwatt, J., in (1945) 1 All.E.R. 268, held that the Companies Act leaves it to a company to frame its articles of association as it thinks proper and any inconvenience resulting from the provisions as to service of notices contained in particular articles are of the company's own making. The company cannot disregard the provision for service of notice on all the members on the ground of futility or inconvenience in serving members with registered addresses in Africa. A meeting without service of notice on such members is not duly convened and a resolution passed in such meeting cannot be confirmed by the Court. But the Court of appeal reversed the decision holding that service of notice on share-holders resident outside the United Kingdom was not essential and that the resolution was validly passed. The law as laid down in In re *Union Hill Silver Co., Ltd.*, (1870) 22 L.T. 400, which has been acted upon ought not to be upset.

D. & I. CATERERS, LTD. *v.* D'AJOU, (1945) 1 All.E.R. 563 (C.A.)=1945 K.B. 364.

Defamation—Slander—Imputation against limited company in the way of its business—Actionable without proof of special damage—No plea of justification—Cross-examination of plaintiff as to previous convictions—When permissible—Imputation of criminal offence—Company if can sue for slander.

Whether or not a limited company without proof of actual damage can sue for a defamatory spoken word imputing the commission of a criminal offence for which, if it were a natural person, it could be sentenced to a term of imprisonment, there is no doubt that a slander of a company in the way of its business is actionable without proof of special damage. A plaintiff in a defamation action can be cross-examined as to credit. But when there is no plea of justification and the defendant gave notice of intention to call evidence in mitigation of damages it is not open to the defence to give evidence or cross-examine the plaintiff as to previous convictions for other offences to get in facts in mitigation of damages.

B. O. MORRIS, LTD. *v.* PERROTT AND BOLTON, (1945) 1 All.E.R. 567 (C.A.).

Res Judicata—Judgment against one defendant without satisfaction—How far bar to fresh action against others.

Excepting in the case of a joint contract or relation of principal and agent, if the causes of action are different, a judgment without satisfaction against one defendant is no bar to an action against other persons liable, and this is so even if the plaintiff deliberately refrains from proceeding to execution on the first judgment. The test is not whether the subject matter of the contract is the same in both actions but whether the cause of action is identical in both. But the plaintiff cannot have double satisfaction and the decree in the second action may provide that the plaintiff is not to recover more than the claim in all.

CRICKLEWOOD PROPERTY AND INVESTMENT TRUST, LTD. *v.* LEIGHTON'S INVESTMENT TRUST, LTD., (1945) A.C. 221 (H.L.).

Lease—Frustration—How far discharges the contract of lease.

The lessees under a building lease for 99 years from 25th March, 1936, resisted a claim for rent on the ground of impossibility of building created by the restrictions imposed on work of that character and on acquisition of materials imposed by valid orders under the Defence Regulations.

Held, the orders requiring a suspension of building are not sufficient to strike at the root of the agreement. Frustration where it exists does not work suspension but brings the whole arrangement to an inevitable end forthwith. Having regard to the fact that the lease had more than 90 years to run and that the length of the interruption caused by emergency measures must presumably be a small fraction of the whole term, the interruption cannot be regarded as determining the lease. Accordingly the lessees liability for rent continued uninterrupted.

Per Viscount Simon, L.C. and Lord Wright:—The proposition that a lease can never be determined by events equivalent to frustration goes too far and cannot be accepted as an abstract proposition.

Per Lord Russell of Killowen and Lord Goddard: The doctrine of frustration can never apply to determine a lease.

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LAW OF CARRIERS BY LAND, WATER AND AIR.*

By

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Introduction.

The law of carriers by land, water and air is more or less governed by the law of "common carriers."

"Carriers" are of two kinds. They may be private carriers carrying goods of particular persons and on occasions and, not of all, indiscriminately; though they might invite all, they might reserve the right to accept or reject. But even they are bound to take reasonable care of the goods entrusted, but not liable if the owner contributes to their loss or damage or keeps them under his control or if the loss arises from the misconduct or want of care of the owner. Public carriers hold themselves out as willing to carry for remuneration all and sundry and their goods indiscriminately, carrying on the work not as a casual occcupation but as a public business, provided the passengers and goods are in fit state and provided the accommodation is sufficient. The Indian Carriers Act of 1865 defines a carrier as a person engaged in a special business of transporting property for hire for all persons indiscriminately. It does not matter if he holds out to undertake a special voyage : *The India General Navigation Co.* v. *Dekhare Tea Co.*[1] He might profess to carry only small parcels or goods of one description, or only to certain places. There might be gratuitous carriers. But if they do it as a business and carry indiscriminately they are common carriers. They are also bound to use the same amount of reasonable care. The real test is, "has he the right to reject any passenger or goods for no sufficient cause"; if he has, he is not a common carrier. A common carrier cannot restrict his liability or that of his servants by any condition. See *Peek* v. *North Straffordshire Ry. Co.*[2] Again there are carriers for reward who may not be common carriers but bailees under sections 151 and 152 of the Indian Contract Act. By "Carriers" is meant, in this article "common carriers."

The origin of the "Law of common carriers" is attributed by Denman, J., to Roman Law (See *Nugent* v. *Smith*[3]). But Cockburn, C.J., in the Court of Appeal dissents from this view and traces it to the English Common Law (*Nugent* v. *Smith*)[4] with which Holmes, C.J., of the Supreme Court of the United States agrees. *Vide*, Holmes' Common Law, Lecture V.

There are common carriers by land, water and air the last of which came into prominence after the Great War of 1914-18. Among carriers by land there are carriers by ordinary roads such as owners of horses, pack horses, stage coaches,

* Lectures delivered under the auspices of the Madras Bar Council.

1. (1923) 93 L.J.P.C. 108.
2. (1863) 10 H.L.C. 473 and 511.
3. (1875) 1 C.P.D. 19.
4. (1876) 1 C.P.D. 423, A.C.

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hackney carriages, buses and cars; there are tramways and Railways, propelled by electric and steam power. Among carriers by water, there are inland and coastal steamers and steamers sailing over distant seas, barges, flats, lighters and also even boatsmen, carrying goods for hire for all indiscriminately. Among carriers by air, may be included, airships, aeroplanes, balloons and gliders, etc.

The liability of the common carrier at common law for goods and luggage is that of an insurer of goods entrusted with him except when the loss or damage is caused by the act of God or King's enemies. But when goods or luggage are under his control, then he will not be liable as an insurer if the goods or luggage are lost through passenger's neglect. And when they are in the passenger's actual control such as a watch, etc., the carrier will be liable only if the loss is caused by his neglect. In the case of a passenger, the carrier is bound only to take ordinary care for the passenger's safety, and is liable for negligence.

As regards the common carriers of goods by land and by water it is settled law (*Coggs* v. *Bernard*[1]) that they are liable as insurers of goods and are under an absolute liability for loss or damage to goods entrusted to their care for carriage unless saved by the old common law exceptions such as the act of God or King's enemies, etc. There are certain statutory exemptions of recent date. Before dealing with those common law and statutory exceptions it is necessary to consider whether the carriers by air such as aeroplanes, airships and dirigibles are common carriers in the legal sense.

The principles underlying the law of carriage should be the same in and over whatever element the traffic is. But for some doubt cast on the position in a recent decision in *Aslan* v. *Imperial Airways Ltd.*,[2] the same principles of the law of carriage for land and water would have been considered as applicable to carriage by air. In that case the Imperial Airways, Ltd., were held not to be a common carrier. The case was decided on the special facts that the company never held out as a common carrier; and the decision turned on the special terms of the contract. In that case an owner of two bars of gold entrusted them to an air transport company, the Imperial Airways, Ltd., for transit from Bagdad to London. At some stage of the journey when the gold was transhipped from a land machine to a sea plane, it disappeared. The company had excluded their liability by two clauses, one to the effect that they reserved the right to reject any goods as they liked, thereby indicating that they are not following the profession of a common carrier, and the second clause provided that all goods were subject to a general transport condition for air freight service which were received by or in the custody of Messrs. Imperial Airways, Ltd., (who were not common carriers) or of their agents for carriage or otherwise. It is clear therefore that the Imperial Airways Ltd., purported to act only as a private carrier, and as a private carrier their liability is only for negligence which could be got rid of by a clause in the consignment note that the company accepted freight at the consignor's risk. This decision does not lay down any general rule. Further, the learned Judge observed that there was no reason why a man who carried goods by a machine that travelled through the air should not be a common carrier if he acted as a common carrier. Thus it follows that in the absence of any statutory provision the principles of common law applicable to a common carrier will be applied by Courts to cases arising from carriage by air transport.

The liability of a common carrier whether it is by land, water or air must be deemed to be that of an insurer, subject to the limitations imposed upon it by common law and statute. The earlier common law exception to the liability of common carrier was loss caused by act of God and King's enemies.

"Act of God," may be taken to be an accident due to natural causes, without human intervention and not preventible by human foresight. To be an act of God, the accident should be independent of human action and could not be avoided or guarded against; if it could have been foreseen, it could not have been

1. (1703) 2 Ld. Raym. 909 at 917. 49 T.L.R. 415.
2. (1933) 38 Com. Cas. 227 : 149 L.T. 276.

prevented such as lightning, or forces of nature such as floods, etc. It need not have been extraordinary or violent.

The term "King's enemies" means and includes armed Forces of a foreign power at war with the King. This does not include rioters and robbers on land but includes pirates and robbers on high seas as pirates and robbers are considered as enemies of all nations. A carrier is bound to avoid acts of King's enemies but he ceases to be liable if he attempts to avoid, though he might fail.

Inherent defect or vice in the thing carried—no matter whether the thing carried is goods or animal—is another common law exception. The carrier is bound to exercise such care as the nature of the thing demands, unless he is misled by the consignor not giving him due notice as to the defective nature of the goods or animals carried. Further, the loss or damage should not be traceable to the consignor.

Another equally important common law exception is the defective packing through the fault of the consignor and of which defective packing the carrier had no notice. If the carrier has notice of the defective packing or if the carrier does anything to make the consignor believe that the packing is safe and sufficient, the carrier cannot claim the benefit of the exemption.

The above exception may be considered as applicable to carriers by land, water and air. But there is another exemption which is peculiar only to the carriers by water namely the right to jettison to save a ship and rest of the cargo from imminent and impending danger.

These common law exceptions from liability are not available to a common carrier if he has been negligent or if he has deviated or if the vehicle is not 'fit' for the purpose.

As regards deviation, in a leading case *Thorley Ltd.* v. *Orchis Steamship Co.*,[1] deviation was held to alter the character of the voyage so that a shipowner guilty of it cannot be held to have performed his part of the bill of lading contract and cannot claim the benefit of the stipulation contained in the bill of lading although no damage was caused by deviation. In the case of a carrier of passengers deviating, the carrier is liable only if he is negligent. To find out the ordinary commercial route the Court will consider parol evidence on the point. *Frenkel* v. *MacAndrews and Co.*[2]

As to the implied warranty of fitness of the vehicle or conveyance by water, at common law there is an absolute warranty of the seaworthiness of the carrying vessel. The Shipowners' liability is absolute even for defects not discoverable by careful examination. In the United States of America the same stringent rule of liability is imposed on the carriers by sea. To be 'Seaworthy,' the ship should be fit in design and structure to encounter ordinary perils of the voyage and the ship and her equipment must be suitable for the safe carriage of such goods. In voyage by stages it should be seaworthy at successive voyages, and in voyages by time-charter at the commencement of the voyage. The seaworthiness must exist both at the time of loading and at the time of sailing but there is no implied warranty of continuous "seaworthiness." In *Barrett* v. *London General Insurance Co.*,[3] it was held that not only the shipowners should do their best to make their ship fit but that the ship should really be fit.

Regarding the fitness of vehicle of a carrier by land, the law remains uncertain and the decisions are conflicting. In an earlier English case there is a dictum, that the proprietor of a coach, not in a roadworthy condition, was to be held liable for the consequences in the same way as a ship-owner furnishing a vessel not seaworthy. But in *Readhead* v. *Midland Ry. Co.*,[4] it was held that the common carriers by land do not undertake the warranty of fitness of their vehicles. In this case the plaintiff sought damages for injuries by an accident caused by the breaking of the tyre of a wheel of a railway carriage. It was contended for the plaintiff that

1. (1907) 1 K.B. 660 at 669.
2. (1929) A.C. 545.
3. (1935) 1 K.B. 238.
4. (1869) L.R. 4 Q.B. 379 at 387.

the owners of the carriage are bound to keep it in a roadworthy condition. The Court did not uphold the contention, with Blackburn, J., dissenting at p. 383, "But first it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods." His obligation is to carry and deliver the goods in safety whatever happens. In the words of Lord Holt, "he is bound to answer for the goods at all events. Again the law charges the person thus entrusted to carry goods against all events but 'acts of God and of the enemies of the King,' and this broad obligation renders it unnecessary to import into the contract a special warranty of roadworthiness of the vehicle for if the goods are safely carried and re-delivered it would be immaterial whether the carriage was roadworthy or not. And if the goods are lost and damaged the carrier is liable on his broad obligation to be answerable 'at all events'; and it is unnecessary to inquire how that loss or damage arose." To put shortly, the argument is that as the common carrier by road is an insurer he is liable for the loss at all events. If the act of God or King's enemies occasion the loss, the common carrier is absolutely immune. In either case whether liable or immune, there is no need to consider whether the carriage is roadworthy or not. This argument ignores the fact that the common law exceptions such as acts of God, King's enemies, etc., are available only when the roadworthiness of the carriage is established. In *Barrett* v. *London General Insurance Co., Ltd.*,[1] the view is taken that there is an implied warranty of roadworthiness in a motor car. But the Privy Council in *Trickett* v. *Queensland Insurance Co., Ltd.*,[2] felt unable to follow that view.

Regarding the carriers by air, there is no direct case as to the implied warranty of airworthiness by a carrier by air. *Aslan* v. *Imperial Airways Ltd.*,[3] contains an observation that the Judge ought not to import into the contract of carriage by air such a warranty of fitness as was warranted into a contract of carriage by a ship and that a carrier by air is bound only to exercise reasonable skill in providing a reasonably safe machine. But the correctness of this observation may be questioned in view of the fact that the case was decided on special facts namely, that Messrs. Imperial Airways, Ltd., were not holding themselves out to carry the goods of all and sundry which is the usual indication of the business of a common carrier which fact compelled the Court to hold that that company was not a common carrier. At the same time the Judge expressed his opinion that there was no reason why a person who carried goods by a carriage through air should not be a common carrier if he acted as a common carrier. If this view is correct and if the argument that the principles underlying the law of carriage in and over whatever element should be the same is sound, it follows that the same warranty of fitness is implied in the carriage by air. This conclusion seems to gain support from the fact that section 9 of the Air Nagivation Act of 1920 (10 and 11, Geo., 5, c. 80) which makes the position of the owner of an aircraft even more burdensome than that of an insurer for any damage caused by an aircraft to a person or to his property on the surface by any person or article falling from it, etc., for which only the plea of contributory negligence on the part of the injured could be set up by the carrier—*vide* also Articles 2 and 3 of the Rome Convention of 1933.

To the above common law exceptions to the liability of a common carrier may be added the exemption created by statute. There is nothing in common law to prevent a common carrier from making a special contract to control or curtail his liability from that of an insurer.

Among carriers by land, *i.e.*, among mail contractors, stage coach proprietors or other common carriers a custom arose to post notices in their offices to the effect that unless the owner of the goods paid a carrier an additional sum as insurance fee in the case of particular goods, the carrier is not responsible for their loss. If knowledge of that notice to the consignor is proved, he is bound by the notice. Great difficulty and inconvenience were caused to the consignor on account of the

1. (1935) 1 K.B. 238 at 241.
2. (1936) A.C. 159.
3. (1933) 38 Com. Cas. 227: 149 L.T. 276: 49 T.L.R. 415.

insufficiency of this notice. Further, articles of great value were sent by the consignors in small parcels and the carriers without knowing their contents were not able to take proper care of them and were put to great risks and loss. So the Carriers Act of 1830 (1 Will. IV, c. 68), was passed—*vide* the corresponding Indian Carriers Act III of 1865. The Carriers Act of 1830 enacted that in the case of articles above £ 10 in value (which was subsequently raised to £ 25) the nature and value of the articles should be declared to the carrier at the time of delivery and that an increased rate, charged for such articles, should be paid. The articles mentioned in the list required particular care and they should be contained in a parcel or package. If articles whose value is above £ 10 were mixed with articles whose value is less than £ 10, and the value of the former not declared, then, in case of damage or loss, no damage as regards the former could be claimed but only that of the latter. If articles of value below £ 10 is an accessory to the undeclared articles above £ 10 in value, then the value of neither could be recovered in case of loss. In case of loss of declared articles, both their value and the increased charge had to be paid back by the carrier to the owner. Even if the loss of the declared articles were temporary, the Act applied but not when there was only a temporary delay. But if the injury to the undeclared article arose from the felonious act of a servant of the carrier, the act gave the carrier no protection.

It has to be noted that the Carrier's Act of 1830, was passed before Railways existed and the Act was not worded in terms to include them. But within the phrases " other public conveyances by land for hire " and " other carriers " in the Carriers Act of 1830, they were included when questions relating to them came before Courts. The Carriers Act of 1830 did not prevent a carrier from limiting his liability even for gross negligence by entering into a special contract. The harshness and the injustice of this state of law caused great stir when the case of *Carr* v. *The Lancashire and Yorskhire Ry., Co.,*[1] was decided. To remove the injustice caused by the non-liability of the carrier even for gross negligence where he enters into special contract with the consignor, the Railway and Canal Traffic Act of 1854 was passed.

Section 2 of the Railway and Canal Traffic Act of 1854 provided that all Railway companies should afford reasonable facilities for the receiving, forwarding and delivering of traffic. Traffic includes passengers and their luggage, goods, animals and other things carried by any Railway company. Railway companies cannot refuse to carry goods which they have facilities of carrying, but they are not obliged to carry any goods as common carriers. Section 7 of this Act renders a Railway Company liable for loss or injury of goods caused by neglect or default of the Railway Company or its servants notwithstanding any notice to the contrary. The loss or injury must be caused by neglect or default of the company, or its servants. The default of the servant must be in the nature of negligence and within the scope of servant's authority. The liability of the Conpany in the case of certain animals is limited to certain definite sums unless their higher value is declared by the consignor. The conditions in a contract exonerating the carrier must be perfectly just and reasonable. In the case of existence of different rates for carriage, a fair alternative to choose between the lower uninsured and the higher insured rate had to be given. Further, the exonerating conditions should be embodied in writing signed by the consignor or his agent. The onus of proving misconduct of the Railway Company is on the plaintiff. Under the older forms of consignment note, a Railway Company was liable for loss, damage or delay. But under the forms in use under the Act, although goods were sent at the owner's risk the Company accept liability for non-delivery of any goods though they are addressed to the consignee, for pilferage from package and for misdelivery when goods are not delivered within a particular number of days though the goods are properly, addressed. The Railway and Canal Traffic Act does not affect conditions relating to matters after end of transit or conditions relieving the Company after handing

1. (1852) 7 Exch. 707.

over the goods to another Carrier. Under the Act to make the Company liable, notice that they are intended for the market should be given. Complaints as to damage to goods should be given promptly to avoid the disappearance of facts to be investigated. A Railway Company under the Act is not bound to carry dangerous goods unless their nature is distinctly marked outside of the package. If the Railway Company does not know of their dangerous nature, the consignor is liable for the injury. If dangerous goods are carried at Company's risk without the Company knowing their dangerous condition, the Company is liable for loss or damage to the owners of other goods and the Company can recover it from the consignor. If such goods are carried at owner's risk, properly the Company is not liable, but owners of other goods may have a right of action against the consignor. And such consignor who did not apprise the Railway Company of the dangerous condition of the goods would be liable in damages for personal injury caused by such dangerous goods to a servant of the Company. If a company suspected a package to contain dangeorus goods it can require the reopening of it and examine the contents. It is for the Company to decide what goods are dangerous. The Railway and Canal Traffic Act requires Railway Companies to give facilities for through traffic on their lines and those of other Companies. If the receiving company contracts with the consignor to carry goods all the way and accordingly receive the goods, the receiving company is liable for the whole transit, unless the receiving company is exempted by any contract. A Railway Company can make any contract regarding goods after handing them over to another carrier company and such contract is not void on the ground of being unjust and unreasonable. In through contracts of carriage, the second company seem to act as the agent of the receiving company. If the receiving company contracts not to be liable after handing over goods to the second carrying company, then the receiving company acts as an agent of the second carrying company which in turn becomes liable as common carrier. But in any case if the loss occurs by the negligence of the second company or its servants, the latter company is liable.

In India also the Common law of England regulated the responsibility of common carriers at the time of the passing of the Carriers Act of 1865. It is still in force in India and is unaffected by sections 151 and 152 of the Indian Contract Act and they are insurers and not mere bailees: *M. Kant Shaw* v. *I. G. Steam Navigation Co.*[1] The Carriers Act does not apply to carriers by sea : *Bombay Steam Navigation Co., Ltd.* v. *Vasudev Babu Rao*[2]. Corresponding to section 7 of the Railway and Canal Traffic Act of 1854, section 6 of th Indian Carriers Act provides for limiting the liabilty of a carrier by a special contract by the owner of the goods or his authorised agent. The rights and duties of a common carrier in England which governs the rights and duties of a common carrier in India are recognised by the Carriers Act III of 1865. The liability of common carriers is not within the Indian Contract Act, notwithstanding some general expressions in the Chapter on bailments. But the Railway Acts of 1878 and 1890 reduce the liability of carriers by Railway to that of bailees under sections 151 and 152 of the Indian Contract Act : *Irawady Flotilla Co.* v. *Bhagavan Das*[3].

In the case of carriers by water, certain exceptions to common law liability as an insurer were created by statute.

By section 502 of the Merchant Shipping Act of 1894 the shipowner was made not liable for loss or damage caused by fire in a ship without his fault or privity. He is also freed from liability for robbery or embezzlement of gold, silver, diamonds, watches, jewels or precious stones if their value were not declared at the time of shipment and a higher freight is not paid.

By section 1 of the Merchant Shipping Act of 1900, this limitation of liability was extended to all cases, without the owner's actual fault or privity, of loss or damage to property or right of any kind whether on land or water, or whether

1. (1883) I.L.R. 10 Cal. 166 (F.B.).
2. (1927) I.L.R. 52 Bom. 37.
3. (1891) L.R. 18 I.A. 121 : I.L.R. 18 Cal. 620 (P.C.).

fixed or moveable by reason of improper navigation. Section 2 of the Act extended this immunity to owners of any dock or canal or harbour.

These provisions of the limitation of Shipowners' liability under Merchant Shipping Acts apply to loss of goods in transit under a contract which was in part for carriage by land; and by section 12 of the Railway Act of 1871 this benefit is extended to Railway Companies who are under contract to carry persons and who procure shippers to carry in their vessels.

By section 1 of the Maritime Conventions Act of 1911 when one vessel is injured by the default of two or more vessels, liability is proportionate to default. If the degree of default is not ascertainable, then the liability is equal. When loss or personal injury to a person on board is caused by the default of carrying vessel and another. The liability is joint and several.

By section 7 of the Railway and Canal Traffic Act of 1854 the liability is limited to a definite sum in the case of horse, cattle, sheep, etc., unless their value is declared.

By the application of Carriage of Goods by Sea Act, 1924, 14 and 15 Geo. V, c. 22, to cases, to which this Act applies, certain standard causes with irreducible liability were introduced in all bills of lading. This Act does not apply to live animals, deck cargo, coasting trade etc. Under the Act the carrier is bound to supply seaworthy ships well equipped. He is bound to carefully load, handle, stow, keep and carry. But he can contract himself out of liability from the effects of unseaworthiness (provided he takes due diligience to guard against it), of excepted perils mentioned in Article IV (2) of the Act, and of deviation for saving or attempting to save life and property. Section 6 of the Carriers Act preserves to the carrier the right to destroy damaged goods under sections 446 to 450 of the Merchant Shipping Act of 1894.

In India as regards the statutory exemption from liability of a carrier by sea, the law is the same as in England and the Indian Merchant Shipping Act of 1923 and the Indian Carriage of Goods by Sea Act XXVI of 1925 limit in the same way the liability of a common carrier by sea.

Before enumerating the nature of exemptions created by statute regarding carriers by air, it is necessary to refer in brief to the relevant portion of the history of the aerial transport. The sovereignty of States, though in theory was claimed *usque ad cœlum*, was in practice confined only to the surface of the Earth and to a reasonable height above it. But when man began to take to air in aircraft more frequently, the problem for consideration as to the exercise of actual right of sovereignty over the surface arose. Two divergent views prevailed among jurists, one was that the air surface should be free to all above a particular height over the surface and the other was that the whole column of air and the space over the surface belonged to the State below. In 1910 a Conference was held at Paris which did not come to any final conclusion as the British delegates wanted exclusive sovereignty in the air space over its territories and as the German delegates stood for absolute freedom for all in air, above a particular altitude.

In England to protect the public from danger the Aerial Navigation Act of 1911 (1 and 2, Geo. V, c. 4) was passed empowering the Secretary of State to prohibit flight over particular areas. The Aerial Navigation Act of 1913 (2 and 3 Geo., V, c. 22) empowered the Secretary of State to include within his powers purposes of defence of the realm. By order in Council, the entry into the United Kingdom was limited to certain strips of coast and it specified certain compulsory landing grounds. In 1914, during the Great War, the flight of the aircraft over the United Kingdom was limited except within 3 miles of a recognised aerodrome. The experience of the Great War of 1914 to 1918 reinforced the view of State's right over the air *usque ad cœlum*. Holland, Denmark, Switzerland, regarded the passage of belligerant aircraft as a non-neutral act. In 1917 a Civil Aerial Transport Committee was appointed which recommended the adoption of *usque ad cœlum* theory while at the same time the Committee recognised the commercial advantage of uninter-

rupted flight of aircraft and emphasised the desirability of a liberal admission of foreign aircraft into the United Kingdom.

After the Treaty of Versailles 1919, the Paris International Convention for the regulation of aerial navigation of 1919 took place between the victorious powers. By articles of the Convention of Paris, of 1919, every contracting state has complete and exclusive sovereignty over the air space above its territory. The territory of a State shall be understood as including the national territory both that of the mother country, and of the colonies and the territorial waters adjacent thereto. By article 2, each contracting party undertakes in time of peace to accord freedom of innocent passage above its territory to the air craft of the other contracting states. By article 15, every aircraft of a contracting State has a right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. This right is subject to the duty to land if ordered for reasons of general safety.

To give effect to the articles of the International Convention of Paris, 1919, the Navigation Act of 1920 (10 & 11, Geo. 5, ch. 80) was passed. It not only adopted the provisions of the Paris Convention of 1919, but it made further provision for the control and regulation of aviation. Further amendments were made to it by the Air Navigation Act of 1936 (26 Geo. 5 & 1 Ewd. 8, c. 44).

We may now turn to consider the statutory exemption from liability of the owner of an aircraft and classify them under two heads (1) His liability to surface damage; (2) His liability to goods and passengers in the aircraft. The Civil Aerial Transport Committee was appointed in or about 1917 to consider means for the development and regulation of aviation. It appointed a special Committee. The most important of its recommendations, adopted by the main Committee were that (1) No action for trespass should lie except for material damage to person or property whether caused by flight, ascent or landing or the fall of objects from an aircraft and (2) that the obligation on the air-men in an action for trespass should be absolute, negligence not being a necessary element in his liability and "unavoidable accident" no defence. The Parliament incorporated these recommendations when the Air Navigation Act of 1920 was passed, section 9 of which, as unaltered but amended by Air Navigation Act of 1936, enacted: "No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of the aircraft over any property at a height above the ground, which having regard to wind, weather, and all the circumstance of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder are duly complied with; but where material damage or loss is caused by an aircraft in flight taking off or landing or by any person in any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss without proof of negligence or intention or other cause of action as though the same had been caused by its wilful act, neglect or default, except when the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered." Thus the liability of the owner for the damage so caused is an absolute one unless the person suffering the damage is guilty of contributory negligence.

It is quite possible that the damage suffered by a person by any person or thing falling from the aircraft to be out of all proportion to the ability of the owner to pay. The Rome Convention of 1933 was the offspring of an attempt to unify private aerial law and also to unify rights relating to damage caused by aircraft. Gorrel Committee in their report of 1934 supported the adoption of their schemes for aircraft engaged in international flying in the United Kingdom.

But the Rome Convention while limiting the liability of the operator of the aircraft between 6,00,000 francs and 21,000,000 at the rate of 250 francs for each kilogramme of the weight of the aircraft for such surface damage insisted on a simultaneous furnishing of the security in the shape of a deposit of money or bank

guarantee by the owner of the aircraft equivalent to an amount not less than the amount of that limited liability so that compensation to the injured might be assured *vide* articles 8 and 15 of the Rome Convention.

Accordingly the Air Navigation Act of 1936, which was enacted to give effect to the Rome Convention, limited by section 15 the liability of the owner of the air craft in accordance with the provisions of the second schedule to this Act, *i.e.*, between £ 1,000 and £ 25,000 and if the weight of air craft exceeds 10,000 lbs. at the rate of £ 1 for each pound of aircraft fully loaded. Section 16 of this Act ensured that a person shall not fly an aircraft unless there is in force in relation to the flying of an aircraft by that person a policy of insurance by an authorised insurer or a security given by an authorised giver of securities for the amount of that limited liability.

Next we turn to the liability of the owner to the goods, luggage and passengers in the aircraft. From what is narrated above it is evident that the Paris Convention of 1919 led to the enactment of the Air Navigation Act of 1920 dealing with the liability of the owner of the aircraft for surface damage. The Rome Convention of 1933 led to the enactment of the Air Navigation Act, 1936, which limited the liability of the owner of the aircraft, but led to the creation of a concomitant obligation in him to insure against or take security for any surface damage. The Warsaw Convention of 1929 was held to unify the rules relating to International Carriage by air. To give effect to the Warsaw Convention of 1929 the Carriage by Air Act of 1932 was passed which adopted the rules of the Warsaw Convention. Section 4 of the Act expressly gave power to His Majesty in Council to apply these rules to internal carriage by air in the United Kingdom. Until this power is exercised, the law of "common carriers" under the common law must apply. But an association of the Chief Navigation Companies called the International Air Traffic Association was formed with its headquarters at Hague. It has adopted certain general conditions of carriage of passengers, luggage and goods which conditions are largely based on Warsaw Rules and all air navigation companies agreed to adopt these forms in all contracts of carriage whether internal or international. If we closely analyse the provisions of the Warsaw Conventionand the Carriage by Air Act of 1932 and the conditions of carriage of the International Air Traffic Association, it will be evident that there is much in common between those conditions and the law of common carriers in the English common law which fact draws us to the conclusion that except in certain matters the Carriage by Air Act of 1932 and the International Air Traffic Association Companies drew their inspiration from the law of "common carriers" that obtained in England.

As regards the liability of a carrier by air to passengers and luggage or goods in the aircraft, articles 17 to 21 of schedule I to the Carriage by Air Act, 1932 and the corresponding Article 20 of the International Air Traffic Association provide that in the event of damage caused by death or the wounding of a passenger by an accident on board the aircraft, or in the course of embarking or disembarking, the carrier is liable for damage sustained unless the carrier proves that he has taken all measures to avoid the damage or that it was impossible for him to avoid the damage and that in the event of damage caused by loss or delay in the luggage or goods, the carrier is liable unless he proves negligence in the pilotage, handling or navigation of the aircraft or unless he proves that he has taken all necessary measures or that it was impossible for him to take such measures to avoid the damage or that the injured person was guilty of contributory negligence.

Such liability of the Carrier by air is limited, by Articles 22 and 23 of Schedule I to the Air Navigation Act of 1932 and by Article 2 of the International Air Traffic Association, to 125,000 francs for each passenger and to a sum of 250 francs per kilogramme in the carriage of registered luggage and of goods unless the consignor

has made, at the time when the package was handed over to the carrier a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that the sum is greater than the actual value to the consignor at delivery. As regards the objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger. By Article 23 of the Schedule I to the Act, any provision tending to relieve the carrier from liability or to fix a lower limit than that which is laid down in this convention shall be null and void but the nullity of such provision does not involve the nullity of the whole contract.

In India there is no provision limiting the liability of the owner of an aircraft for surface damage caused by the fall of any person or thing from an aircraft corresponding to sections 15 and 16 of the Air Navigation Act of 1936 : but regarding the liability of its owner for damage caused to the passengers, luggage or goods, the same rules were made applicable to limit the liability by the Indian Carriage by Air Act 20 of 1934 to which the same first schedule of the English Carriage by Air Act of 1932 was incorporated (*vide* Rules 17 to 21 as to the liability of the carrier and rules 22 and 23 as to the limit of such liability, in Schedule I of the Indian Carriage by Air Act of 1934.)

PROMISSORY NOTES BY *DE FACTO* GUARDIANS.

BY

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It has been held in the recent decision of the Full Bench of the Madras High Court in *Myneni Pundarikakshayya* v. *Kondamudi Sriramulu*[1] that a *de facto* guardian of a Hindu minor has no power to execute a promissory note in any circumstances so as to bind the minor's estate.

This decision is likely to affect a large number of transactions and it may not be inappropriate to examine its basis. At the outset, it must be noticed that the execution of promissory notes is the ordinary mode of creating an indebtedness in this country and they are not strictly looked upon as merely commercial securities used only among businessmen. Of course, when there are special rules applicable to promissory notes by reason of their being negotiable instruments, they should not be overlooked in dealing with such instruments. Again, the person who is compendiously called a *de facto* guardian is not generally a stranger meddling with the assets of a minor but a close relation of the minor like a maternal or paternal uncle or the natural father of an adopted son who has the interests of the minor at heart and consequently manages the estate of the minor. It is not usual in this country to resort to the provisions of the Guardian and Wards Act for the appointment of a guardian unless there is a quarrel among the members of the minor's family or there is a scramble for managing his properties.

In this discussion, we are only concerned with the powers of a *de facto* guardian under the Hindu Law and not those of a *de facto* guardian of a Muhammadan minor. It has been held by the Privy Council in *Imambandi* v. *Mutsaddi*[2] that a *de facto* guardian under the Muhammadan Law has no power to alienate the minor's immoveable properties under any circumstances, although a different view had been taken on an examination of the original texts of the Muhammadan Law by a bench of the Madras High Court of which a Muhammadan Jurist and Judge was a member. See *Ayderman Kutti* v. *Syed Ali*[3].

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1. (1945) 2 M.L.J. 375 (F.B.).
2. (1918) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).
3. (1912) 23 M.L.J. 214 : I.L. 37 Mad. 514.

Coming to the Hindu Law, the foundation of the law on the subject rests on the well-known passage at pages 412 and 413 of the leading case in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[1]. There, their Lordships have laid down that the absence of the *de jure* title in the guardian does not detract from the powers of a manager to charge the minor's properties in proper cases. Though the case itself was one of a mortgage by the guardian, the same rule has been since applied to cases of sales and other forms of alienation of minor's properties and also to cases of simple contracts made by guardians binding minor's general assets. That this rule established by the decision in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[1] should not in any way be interfered with was pointed out when dealing with the question of the liability of a minor's estate on a simple contract entered into by his guardian on his behalf, by Sir Lionel Leach, C.J. and K.S. Krishnaswami Aiyangar, J., in *Annamalai Chetty* v. *Muthuswami Maniagaran*[2] following the Full Bench decision in *Ramajogayya* v. *Jagannadan*[3]. The rule laid down in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[1] has been applied not merely to the case of a *de jure* or a *de facto* guardian of a minor, but also to all cases of qualified owners under the Hindu Law and managers such as a Hindu widow, the manager of a joint family, shebaits whether *de facto* or *de jure* and the manager of a lunatic's estate. It has also been recognised that there is no distinction between the powers of a *de jure* and a *de facto* guardian in regard to a minor's properties and that a *de jure* guardian has no greater powers has been laid down following the enunciation of the law by the Privy Council in the leading case of *Hunooman Persaud*[1]. See *Seetharamanna* v. *Appiah*[4], *Ramaswami* v. *Kasinatha*[5] and *Mukkamalla Hanumayamma* v. *Kasineni Lakshmidevamma*[6].

If as pointed above, the powers of a *de facto* guardian are the same as those of a *de jure* guardian, it remains to see whether a minor's estate can be made liable on a promissory note made by a *de jure* guardian provided, of course, that the note is executed by him *qua* guardian excluding his personal liability and for purposes binding on the minor's estate. The question came up for consideration by a Bench of the Madras High Court in *Swaminatha Odayar* v. *Natesa Iyer*[7] and one of the learned Judges held that though as debt, it may be binding on the minor, a minor's estate cannot be made liable on the promissory note. Then, the question came on a reference before a Full Bench in *Satyanarayana* v. *Mallayya*[8], where the previous case-law was reviewed; and it was decided by the Full Bench overruling the observations in *Swaminatha Odayar* v. *Natesa Iyer*[7] that a minor's estate will be liable on a promissory note executed by a *de jure* guardian. No doubt, it has since been held that surrounding circumstances should not be looked into for deciding in what capacity a promissory note has been executed. See *Sivagurunatha Pillai* v. *Padmavathi Ammal*[9] where the observations to the contrary in *Satyanarayana* v. *Mallayya*[8] *i.e.*, that surrounding circumstances can be gone into for deciding in what capacity the note was executed by the person executing it, have been disapproved. But, this does not affect the correctness of the Full Bench decision in *Satyanarayana* v. *Mallayya*[8] that the estate of a minor can be made liable on a properly executed promissory note of his guardian representing the minor's estate for a necessary purpose. That a minor's estate can be rendered liable on his guardian's promissory note has since been subsequently followed. See *Seetharamayya Garu* v. *Sathiah.*[10] If so, it would seem to follow that a promissory note executed by a *de facto*

1. (1856) 6 M.I.A. 393.
2. (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891.
3. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
4. (1926) I.L.R. 49 Mad. 768 at 771.
5. A.I.R. 1928 Mad. 226 at 230.
6. (1938) 2 M.L.J. 632 at 634.
7. (1932) 65 M.L.J. 350 : I.L.R. 56 Mad. 879.
8. (1935) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).
9. (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.).
10. (1938) M.W.N. 677 : A.I.R. 1938 Mad. 716.

guardian, provided of course it is executed in such a form as to exclude the personal liability of the guardian and is expressed to be executed by the *de facto* guardian in the capacity of such a guardian will equally be binding on the minor's estate if it is for a binding purpose, because a *de facto* guardian's powers are no less than those of a natural guardian as laid down by the decisions referred to above. It may be mentioned in this connection that there is no provision of the Negotiable Instruments Act which prohibits a guardian whether *de facto* or *de jure* from executing a promissory note on behalf of his ward. So, the circumstance that it is a negotiable instrument would not seem to go against its validity as a negotiable instrument. Again, that a Hindu minor is bound by the simple covenant by his *de facto* guardian for a binding purpose has been held by a bench of the Madras High Court in *Sudarsana Rao* v. *Dalayya*[1].

It now remains to notice that there is an observation of Ramesam, J., when delivering the judgment of the Full Bench in *Satyanarayana* v. *Mallayya*[2] to the effect that *Swaminatha Odayar* v. *Natesa Iyer*[3], could be supported on the ground that the promissory note in the latter case was by a *de facto* guardian. This observation was purely *obiter* as the case before the Bull Bench was a case of a *de jure* guardian and the question about the validity of a promissory note by a *de facto* guardian was not considered by their Lordships and the cases from *Hunooman Persaud's case*[4] identifying the position of a *de facto* guardian with that of a *de jure* guardian were not considered by the learned Judges. Again, there is the decision of a single Judge in *Vembu Iyer* v. *Subbiah Pillai*[5]. Judged from the report, the only points considered by the learned Judge was whether the natural father of an adopted boy is his lawful guardian and whether a promissory note executed by him was binding on the minor and the decisions referred to above about the power of a *de facto* guardian were apparently not referred to before him. There is also a decision of another single Judge in *Madava Pillai* v. *Subramania Udayar*[6], which seems to sound the other way, that a promissory note executed by a *de facto* guardian may under proper circumstances be binding on the minor's estate. The decision of the Bombay High Court in *Nagindas Gokuldas* v. *Bhimrao Damu*[7], referred to in the Full Bench decision under notice does not give full effect to the observations of the Privy Council in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[4] identifying the powers of a *de facto* guardian with those of a legal guardian and the above remarks would seem to apply equally to the Bombay decision.

The result of the present Full Bench decision would be that for a binding purpose the *de facto* guardian of a Hindu minor can sell away his properties or mortgage or charge the same and also create simple contract debts, but cannot execute a promissory note binding on the minor.

1. (1943) 1 M.L.J. 339 : I.L.R. (1944) Mad. 879.
2. (1935) 68 M.L.J. 540 : I.L.R. 58 Mad. 218.
3. (1932) 65 M.L.J. 350 : I.L.R. 56 Mad. 735 (F.B.).
4. (1856) 6 M.I.A. 393.
5. (1943) 1 M.L.J. 85.
6. (1943) 2 M.L.J. 556.
7. I.L.R. (1943) Bom. 117.

ON DEMAND MORTGAGE BONDS—LIMITATION.

BY

T. E. RAMABADRACHARIAR, ADVOCATE, MADRAS.

A doubt has been raised regarding the correctness of the Full Bench decision in *Venkitaswamy Chetty v. Ramalingam.*[1] The source of doubt is indicated to be the decision of the judicial committee in *Nilkanth Balwant Natu* v. *Vidya Narasinh Bharatiswami.*[2] An examination of that case would show that the assumption made in the critical note[3] that it was an "On demand" mortgage bond that was under consideration there is not justified by the report of that case. No text writer or authority has read this case in the manner in which the critic wishes to read it.

Coming to our own province *Perianna Goundan* v. *Muthuvira Goundan*[4] has not been overruled so far by any competent authority. It is a direct case on the point and a decision of a bench which has held the field till this date. *Seetharama Aiyar* v. *Muniswami Mudaliar*[5] which is the only case exhaustively reviewing the case-law rests content with concession of counsel, as it cannot overrule *Perianna Goundan* v. *Muthuvira Goundan.*[4]

The real difficulty in understanding and reconciling the cases is raised by *Lasa Din* v. *Gulab Kunwar.*[6] Every mortgage is a security for a loan so that in every such contract there is a contract of loan and a security. So far as contracts of loan are concerned the starting point must be ascertained by a reference to one or other of the articles from 57 to 80 of the Limitation Act. Article 132 gives no indication but refers us back to those articles for ascertaining the starting point. Examining these articles one finds that Article 60 alone provides for a case where demand and its date start the running of time and unless the decisions which hold the date of demand as starting the limitation are assimilated into this article it will be difficult to explain them on any legal or rational basis.

The only method of reconciliation is to start with the accepted principle that a term in a secured loan is intended for the benefit of the mortgagee as much as for a mortgagor, for the mortgagee is as anxious to have a safe investment for the term. So considered the loan is in the nature of a "deposit" during the term. The right to demand the deposit during the term depends upon the happening of a contingency *viz.*, the breach of a covenant. This is the only logical way of understanding *Lasa Din* v. *Gulab Kunwar.*[6] *Cadet Questio* the decision is a just one and it must be maintained on principle and authority.

SUMMARY OF ENGLISH CASES.

DOWD *v.* BOASE & CO., LTD., (1945) 1 All.E.R. 605 : (1945) 1 K.B. 301 (C.A.).

Master and Servant—Respondent superior—Applicability—Negligence of servant driving vehicle hired to another—Accident caused to another servant—Liability—Hirer or regular employer—Test.

Where a workman who has caused an accident to a fellow-workman was driving a vehicle belonging to his master, of which he was in sole charge and which he alone was allowed to drive, it is not easy to establish that the hirer of the vehicle with the driver was his "superior" at the time of the accident. Who was the superior at the time of the accident must depend in each case on the facts of that case, and no case can be said to govern another unless the facts are similar in all respects. One test in cases of a vehicle lent with its service to a hirer is "In the doing of the negligent act was the workman exercising the discretion given him by his general employer, or was he obeying or discharging a specific order of the party for whom, upon his employer's direction, he was using the vehicle or other instrument?" Where the accident to a fellow-worker takes place due to the negligent driving of the vehicle, the driver must be deemed to be exercising a discretion vested in him by his regular employer when he was sent out with the vehicle—and he made a mistake with which the hirers had nothing to do. Accordingly the regular employers and not the hirers were liable for the negligence.

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1. (1945) 1 M.L.J. 233 (F.B.).
2. (1930) 59 M.L.J. 379 : L.R. 57 I.A. 194 : I.L.R. 54 Bom. 495 (P.C.).
3. (1945) 2 M.L.J. Jour. 27.
4. (1897) 7 M.L.J. 313 : I.L.R. 21 Mad. 139.
5. (1918) 37 M.L.J. 613.
6. (1932) 63 M.L.J. 187 : L.R. 59 I.A. 376 : I.L.R. 7 Luck. 442 (P.C.).

SRINIVASAN *v.* SRINIVASAN, (1945) 2 All.E.R. 21 (P.D.A.).

Divorce—Hindu already having a Hindu wife going through a form of marriage with an English woman in England—English marriage a nullity—Polygamous marriages—Recognition in English law.

Courts in England will not refuse to recognise a marriage between two Hindus, notwithstanding its potentially polygamous character. The suggestion in the standard text books that the only kind of marriage which English Law recognises is one which is essentially the voluntary union for life, of one man with one woman, to the exclusion of all others is wrong. Accordingly where an English woman who has been married by a Hindu who had already a Hindu wife living prays for a decree that her marriage was null and void, the Court will recognise as a fact the Hindu marriage and declare the English marriage a nullity.

[Followed in *Baindail* v. *Baindail*, (1945) 2 All.E.R. 374 (P.D.A.), where it was further held that it was immaterial whether the husband was domiciled in British India or in England.]

COWEN *v.* COWEN, (1945) 2 All.E.R. 197.

Divorce—Husband persisting in use of contraceptives and resorting to coitus interruptus *in spite of wife wishing to have a child—Right to dissolution of marriage on ground of non-consummation.*

Where a husband persists in using contraceptives and resorts to *coitus interruptus* in spite of the fact that the wife who consented to the use of contraceptives had withdrawn such consent and wished to have a child, the wife is entitled to a dissolution of the marriage on the ground of non-consummation. Sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. A marriage cannot be held to have been consummated by an act so performed that one of the principal, if not the principal end, of marriage is intentionally frustrated. Her consent for appropriate reasons at the earlier period to such imperfect intercourse will not be a bar to her right to relief.

HICKMAN *v.* PEACEY, (1945) 2 All.E.R. 215 (H.L.).

Evidence—Death in common calamity—Presumption of survivorship—Law of Property Act (1925), *section* 184.

Per *Lord Macmillan, Lord Porter and Lord Simonds* (*Viscount Simon and Lord Wright, dissenting*)—Where two persons perish in a common calamity and there is no evidence as to who died first it is necessarily left uncertain whether they died consecutively or simultaneously, although the circumstances may point with high probability to their not having died at the same moment. In such cases the death shall be presumed to have occurred in the order of seniority and the younger shall be deemed to have survived the elder. (1944) 1 All.E.R. 81 (C.A.), reversed.

HANNAH *v.* PEEL, (1945) 2 All.E.R. 288 (K.B.D.).

Finder of lost article—Right as against all except true owner—Brooch found by occupier in requisitioned house—Person entitled to the brooch.

H, a lance corporal, was stationed in a requisitioned house which was used as a sick bay. In a wall crevice *H* found a brooch of considerable value which he handed over to the police and obtained a receipt. The freehold of the house had been conveyed to the owner only recently just two years before the finding of the brooch. The true owner of the brooch was never found. *H* claimed the brooch as the finder and as such having a good title against all the world save only the true owner. The owner of the house on the other hand claimed the brooch as the free-holder on whose property the brooch was found. The free-holder had never been in actual possession of the house.

Held, the place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. A man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by some one else. Accordingly *H*, the finder, is entitled to the brooch as the finder.

JOTTINGS AND CUTTINGS.

PRACTICE NOTE*—15th Feb. 1945.

Appeal to Privy Council—Constitutional questions between Federal and Provincial Governments—Costs.

Where the judgment of the Board dismissing an appeal by the Governor-General in Council from a decree of the Federal Court of India and upholding the validity of the sales tax legislation passed by the legislature of the respondent, the Province of Madras, was silent as to costs, their lordships on an application by the respondent for the costs of the appeal, directed that the judgment would stand as delivered.

During the course of the argument on the application Lord Russell of Killowen drew attention to the usual practice of making no order as to costs in appeals from Canada involving constitutional questions between the Dominion and a Province, and referred to *Attorney-General for Manitoba* v. *Attorney-General for Canada*, (1925) A.C. 561 at 569, where it was said :

"In accordance with the usual practice there will be no costs."

The position in India was not strictly the same as in Canada, said his Lordship, but was very analogous; it was between Government in the Province and Government in the centre, and he thought that the same practice would probably prevail, and it would be followed in the present case (*Governor-General in Council* v. *Province of Madras*,[1] ante, p. 91). [L.R. 72 I.A. 175.]

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* Present : Lord Russell of Killowen, Lord Porter, Lord Simonds and Sir Madhavan Nair.

1. (1945) 1 M.L.J. 225.

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NOTES OF INDIAN CASES.

ANANT LAL *v.* BHIBHUTI, (1944) I.L.R. 23 Pat. 348.

Baffling, albeit simple, is the term 'agriculturist'. Its precise legal connotation assumes great importance in assessing the scope of the exemption from attachment and sale contained in section 60 (1) (*c*), Civil Procedure Code and from vesting in bankruptcy under section 28 (5) of the Provincial Insolvency Act or under section 52 (*b*) of the Presidency Towns Insolvency Act. The Civil Procedure Code does not define the term. The dictionary meanings vary from a husbandman, a farmer, to any person employed in the art or science of agriculture. According to Murray's Dictionary an agriculturist is a professed cultivator of land, a farmer or husbandman. The term has been the subject of discussion in a large number of decisions indicating wide diversity of approach and thought. A liberal interpretation has been favoured in some cases. Typical of these is the decision in *Gurbaksh Singh* v. *Lal Chand Darshan Lal*,[1] where it was observed that there seems to be no justification for holding that for purposes of section 60 the term excludes a large landowner or one who does not depend solely or mainly on cultivation for his livelihood. A contrary view is found in decisions like *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot*[2]. In that case it was held that a large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of section 60. That the word ought to be understood in its popular sense has been suggested in a number of rulings. In *Bachan Singh* v. *Bhika Singh*[3], it was held that for purposes of section 60 (1) (*c*) an 'agriculturist' is one "belonging to the class of persons who are ordinarily designated as agriculturists". Likewise in *Ashmatulla Sircar* v. *Pan Mahmud Chowdhury*[4], it was pointed out by the Calcutta High Court that section 60 (1) (*c*) protects only the "common agriculturists such as live in the country", that is, the raiyats who till the field and whose main source of livelihood is cultivation.

Another line of cases has laid down that in the context of the respective statutory provisions the term 'agriculturist' should be interpreted in its strictest sense only, a tiller of the soil in that sole character, see *Jivan Bhaga* v. *Hira Bhaiji*[5], *Muhammad Akbar* v. *Harbans Singh*[6], *Sant Ram* v. *Buta Khan*[7].

It is generally agreed that an 'agriculturist' is one not in name merely but in fact, *Bute Shah* v. *Guran Ditta*[8]. It is also clear that the matter will have to be

1. A.I.R. 1936 Lah. 737.
2. (1925) I.L.R. 49 Mad. 227: 50 M. L.J. 90.
3. A.I.R. 1927 All. 601.
4. (1915) 35 I.C. 343.
5. (1887) I.L.R. 12 Bom. 363.
6. A.I.R. 1936 Lah. 532.
7. A.I.R. 1938 Lah. 72.
8. A.I.R. 1927 Lah. 810.

decided with reference to the facts of each particular case. Tests have been suggested not all of which admit of being reconciled. In some cases it has been laid down that unless a person has personally engaged himself in agriculture he will not be an agriculturist for purposes of section 60. In *Nihal Singh* v. *Siri Ram*[1] it is stated: "The juxtaposition of the word 'agriculturist" along with the word 'artisan' in clause (*b*) implies a person who occupies himself in tilling the soil and whose livelihood depends upon the tilling of the soil. 'Agriculturist' means a person who personally engages himself in the occupation of tilling the soil". In *Rubine* v. *Balwantrai Ramnarayan Trividi*[2], it is remarked that an "agriculturist' is one who ordinarily engages himself personally in agricultural labours. In *Habibul Razzaq* v. *Shiam Bahadur*[3], it is pointed out that for purposes of section 60 a man is an agriculturist who engages in the cultivation of land, that is, who ploughs the land, sows the crop and attends to it; and that the cultivation of land by hired labourers by a person who has a different occupation does not constitute a person an 'agriculturist'. The ruling in *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot*[4], however, suggests that the term 'agriculturist' does not necessarily mean a person who works with his own hands.

Again decisions are not uniform as to what degree of dependence on agriculture as a source of livelihood would alone make one an 'agriculturist'. Some cases have held that it should be the *sole source* of living. Thus in *Surangini Deby* v. *Kedarnath Chandra*[5], the Calcutta High Court has expressed the opinion that if a person's only source of living is not by cultivation of land he is not an agriculturist within the meaning of section 60 (1) (*c*), Civil Procedure Code. The enunciation is expressed in a positive form in *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot*[4], where the learned Judges observed that an 'agriculturist' is one whose sole means of livelihood is gained by cultivating land. *Lakshmayya* v. *Official Receiver of Masulipatam*[6], seems to lay down a slightly different test. According to the Full Bench in that case: "An 'agriculturist' is one who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief or principal sources of income are not in our view the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not seem to us to make him an 'agriculturist' within the meaning of the section. . . . The test is he must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise". The test of *"real dependence"* on agriculture replaces the test of its being the *"sole source"* of living. This is made clear by the observation of the Full Bench: "At the same time we see no reason for depriving an agriculturist of the exemption under the section because he may have invested money in a business . . . and may derive some income therefrom and do coolie work and add to his earnings in bad times". The test of agriculture being the main, chief or principal source of living is in terms rejected by the Full Bench. The alternative test of its being the sole source of living is qualified and a third test is propounded whether the person is really dependent on agriculture for his living. Quite a large number of cases have accepted the true test to be whether agriculture forms the *main* or *chief* source of living, *Jamna Prasad* v. *Raghunath Prasad*[7], *Bachan Singh* v. *Bhika Singh*[8], *Sabha Ram* v. *Kishan Singh*[9], *Hazari Singh* v. *Jhunna Singh*[10], *Mt. Azaz Bibi* v. *Mubarak Ali Khan*[11], *Rubine* v. *Balwantrai Ramnarayan Trividi*[2], *Ashmatulla Sircar* v. *Pan Mahmud Chowdhury*[12], *Gopalan* v.

1. A.I.R. 1939 Lah. 388 (F.B.).
2. A.I.R. 1923 Bom. 12.
3. A.I.R. 1935 All. 292.
4. (1925) I.L.R. 49 Mad. 227: 50 M.L.J. 90.
5. (1921) 63 I.C. 681.
6. I.L.R. (1937) Mad. 777: (1937) 2 M.L.J. 11 (F.B.).
7. (1913) I.L.R. 35 All. 307.
8. A.I.R. 1927 All. 601.
9. (1930) I.L.R. 52 All. 1027.
10. A.I.R. 1931 All 20.
11. A.I.R. 1938 All. 85.
12. (1915) 35 I.C. 343.

Gopalkrishnayya[1], *Abdullah* v. *Anjuman Dehi*[2], *Muhammad Akbar* v. *Harbans Singh*[3], *Gurbaksh Singh* v. *Lal Chand Darshan Lal*[4].

The decision under notice takes the view that the exemption provided by section 60 (1) (*c*) can be claimed only where the person tills the land and thereby earns his livelihood, though it would not mean that the tilling should be done by his own hands and not by hired labour. The decision also lays down that cultivation must be his main source of living, adding however that "this will not be the sole test". What the qualification implies or is intended to reserve is not set out. The foregoing review indicates clearly the need for an authoritative elucidation by the Judicial Committee in regard to the question.

ANDHAVARAPPU RAMAMURTI *v.* KULAMONI CHAUDHURY, (1944) I.L.R. 23 Pat. 446.

A noteworthy point is decided in the above case which holds that a court outside the province of Madras cannot give relief under section 19 of the Madras Agriculturists Relief Act, 1938, notwithstanding the fact that the court to which the application is made is the very court which passed the decree and which at the time of passing the decree was a court within the the province of Madras. Consequent on the constitution of the province of Orissa on 1st April 1936, the Sub-Court at Berhampore became thereafter a Court functioning within that province and subordinate to the High Court at Patna, instead of to the High Court at Madras as it till then was. On 9th November, 1928, a mortgage decree was passed by the Subordinate Judge, Berhampore, in a suit on a mortgage of properties within the province of Madras. The mortgaged properties continued to remain so even after the constitution of the province of Orissa. The Madras Agriculturists Relief Act was passed in 1938. Thereafter the judgment-debtor in the mortgage suit applied to the Sub-Court, Berhampore, for a scaling down of the amount due under the mortgage decree, under section 19 of that Act. The question of the competency of that Court to entertain the application was put in issue. Section 2 of Madras Act IV of 1938 declares that "it extends to the whole of the province of Madras". Section 19 contemplates that the application for scaling down of the decree should be made to the Court which passed the decree. That Court in the present case was admittedly the Sub-Court, Berhampore. Only it had ceased to be a Court belonging to the province of Madras from 1st April 1936. Under section 99 of the Constitution Act a provincial legislature may make laws for the province or for any part thereof. There is nothing in the provision bearing on the competency of a Court which was originally within the province but which has subsequently passed outside it to give relief under a provincial enactment passed subsequent to its passing out. Section 19 (1) of the Order-in-Council constituting the province of Orissa shows that the jurisdiction of the High Court at Madras with respect to Berhampore shall cease subject to what is stated in sub-section (2). Section 20 of the Order-in-Council provides for a similar cessation of jurisdiction on the part of all subordinate Courts in the transferred areas. And by virtue of section 4 (2) of the Regulation 1 of 1936 a Court actually constituted under the Madras Civil Courts Act was to be deemed to have been constituted so far as may be under the Bengal Civil Courts Act, 1887, according to the Order-in-Council, with the result that the Berhampore Court ceased to have any jurisdiction for any purpose on any matter arising within the province of Madras from the 1st April, 1936, except in so far as any other notification might have given it such jurisdiction. The application in the case under notice was admittedly not a "proceeding pending in a Court" within the meaning of section 20 (1) of the Order-in-Council. In *Tile Beharani* v. *Raghu Behara*[5], before the constitution of the

1. A.I.R. 1927 Mad. 342.
2. A.I.R. 1928 Lah. 132.
3. A.I.R. 1936 Lah. 532.
4. A.I.R. 1936 Lah. 737.
5. (1939) 1 M.L.J. 340.

Orissa province, the respondent had obtained a decree against the appellant's predecessor in title in the Court of the Subordinate Judge, Berhampore, which decree had also been confirmed by the Madras High Court. After 1st April, 1936, an application for the execution of the decree was filed in the Sub-Court, Chicacole, and objection was raised that the application should have been preferred only to the Sub-Court at Berhampore. The learned Judges held that the latter Court would have no jurisdiction in the matter. No doubt it had been held in *Ramier* v. *Muthukrishna Aiyar*[1], that mere loss of territorial jurisdiction does not take away from the Court which passed the decree the power to execute it. That, however, was a case of a mere transfer of jurisdiction from one Court to another Court within the same province and the chief reason for the decision was that a notification of Government altering the territorial jurisdiction of Courts will not affect pending cases unless special reference is made to them and cannot therefore amount to action under section 150 of the Civil Procedure Code. The very fact that the Order-in-Council of 1936 saved jurisdiction in respect of pending proceedings is a pointer that no jurisdiction can exist in regard to a matter not pending at that time. Moreover after the decision of the Full Bench in *Nagappa Chettiar* v. *Annapurani Achi*,[2] the contention is not open that an application under section 19 of Act IV of 1938 is a proceeding in execution. Such an application would be an independent proceeding to enforce a relief newly conferred. The Courts in the Orissa province can enforce only the laws applicable to India generally and the law applicable to their own province. They cannot enforce laws applicable to a province other than their own. It is thus clear as pointed out in the instant decision that a Court outside the province of Madras cannot give any relief under Madras Act IV of 1938 notwithstanding even the special facts that that Court was the very Court which had passed the decree, that the decree was one passed at a time when that Court was within the province of Madras and that the properties affected by the decree were properties which were and continue to be within the province of Madras. The result is that the Berhampore Court cannot give relief. And no other Court in Madras can do so either for section 19 contemplates that relief can be granted only by the Court which passed the decree. It seems to be a *casus omissus* in Act IV and a matter for legislative interference.

NANDKUMARI DEVI *v.* BULKAN DEVI, (1944) I.L.R. 23 Pat. 508.

Two decisions have recently considered the meaning of the words 'separate property' occurring in section 3 (1) of the Hindu Women's Rights to Property Act, 1937. One is the decision of the Patna High Court referred to above. The other is a pronouncement of the Federal Court in *Umayal Achi* v. *Lakshmi Achi*[3]. The former is earlier in point of time. The latter contains no reference to it. In the Patna case two interesting questions among others concerning the scope and range of section 3 (1) were raised. The first was whether the property of a sole surviving coparcener could be regarded as his separate property for purposes of the Act. The second was whether on the death of the widow of an intestate who had shared his properties under the Act with a pre-deceased son's widow the latter could claim the former's share as well by way of reversionary succession in preference to the intestate's daughters under the proviso to section 3 (1).

On the first question the Federal Court has in *Umayal Achi's case*[3], taken the view that the property of a sole surviving coparcener who died intestate cannot be regarded as his separate property within the meaning of section 3 (1) and would be governed by section 3 (2) in regard to succession thereto. In *Anant* v.

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1. (1932) 62 M.L.J. 687; I.L.R. 55 Mad. 801 (F.B.).
2. (1941) 1 M.L.J. 164 (F.B.).
3. (1945) 1 M.L.J. 108 (F.C.).

Shankar[1], while pointing out that the interest of a sole surviving coparcener was neither complete nor absolute, Sir George Rankin cited with approval the following passage in the judgment of the Nagpur High Court in *Bajirdeo Tukaram Kumbi v. Ramkrishna*[2]: "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member". In *Umayal Achi's case*[3], there was the possibility of the introduction of a coparcener or more by adoption or adoptions by the widow of the intestate as well as by the widow of his pre-deceased son. In the Patna case, however, it was not "the case of any of the parties that there was any possibility that after the death of Narayan Sao (the last coparcener) a further coparcener could be introduced into the family by adoption or otherwise". It looks as if this difference in the facts of the two cases may not, having regard to the reasoning of the Federal Court, be of any significance in considering whether the property of a sole surviving coparcener will always wear the same character as separate property or as joint family property, for purposes of the Act.

There is no single Sanskrit word or phrase in the texts connotative of separate property as opposed to joint family property. The term *sapratibandha daya* seems to express more the result rather than any distinctive character of the property. Nor have the decisions used the words 'separate property' in any uniform sense, the sense being often left to be ascertained from the context. Modern text-writers also have not been consistent in the matter. Sir Dinshaw Mulla, at one place, includes in 'separate property' the property held by a sole surviving coparcener when there is no widow in existence who has power to adopt.[4] At another place he refers to the power of the sole surviving coparcener to dispose of the coparcenary property *"as if it were"* his separate property[5]. Practically the only statute prior to Act XVIII of 1937 where the words 'separate property' occur is the Hindu Gains of Learning Act (XXX of 1930). That Act purports to remove doubts as to the rights of a member of a Hindu undivided family in property 'acquired' by him by means of his learning. Section 3 begins with the words: "Notwithstanding any custom, rule, or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer, etc". The use of the word *'exclusive'* might suggest that property may be separate though it is not the exclusive property of the acquirer. To import such a distinction into section 3 (1) of the Hindu Women's Rights to Property Act may not however be justified as the two enactments cannot be said to be in *pari materia*.

In reaching the conclusion that the property of a sole surviving coparcener will not be 'separate property' within the meaning of section 3 (1), the Federal Court was to some extent influenced by the closing words of section 3 (1) as that section stood before its amendment by Act XI of 1938, *viz.*, "devolve upon his widow along with his lineal descendants in like manner as it devolves upon his son"; words which will according to their Lordships be appropriate only to the case of self-acquired property but not to property obtained at a partition or as a sole surviving coparcener. The Federal Court recognised that the language of the clause substituted by Act XI of 1938 ran somewhat differently but it held that the change had left the scheme of the Act unaffected. It may be mentioned that in section 3 as it now stands the word "devolve" occurs only in sub-section (3), an omnibus provision covering both the case of 'separate property' and 'an interest in a Hindu joint family property'. In the Patna case the approach was different. It was recognised that in legal parlance the words

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1. (1943) 2 M.L.J. 599: L.R. 70 I.A. 232 (P.C.).
2. I.L.R. 1941 Nag. 107, 118.
3. (1945) 1 M.L.J. 108 (F.C.).
4. Principles of Hindu Law, 9th edition, 1940, p. 230.
5. *Ibid.*, 257.

'separate property' were sometimes used to refer to property bearing a particular character, a character determined by the manner in which the intestate or his pre-deceased coparceners had acquired title to the property, and at other times to refer to the mode in which the property was possessed and enjoyed by the intestate. The learned Judges argued that the use of the words "an interest" in section 3 (2) shows that the phrase "an interest in a Hindu joint family property" has reference not to the mode in which title has been acquired but principally to the nature of the possession had, that it would therefore be natural to conclude that the words 'separate property' in section 3 (1) also refer to the mode of possession and enjoyment and as such the property of a sole surviving coparcener being property exclusively enjoyed and possessed would be 'separate property' within the meaning of sction 3 (1). It may however be mentioned that section 3 (3) designates the widow's right arising both under section 3 (1) and section 3 (2) as an *"interest"* devolving on the Hindu widow; though the word "interest" occurs in section 3 (2) only and not in section 3 (1). In the circumstances, to draw support for a conclusion mainly or exclusively from the use of any particular word or phrase may not be permissible. In view of the fact that the Federal Court has given leave to appeal from its decision in *Umayal Achi's case*[1], it may be that the problem will be set at rest by the Judicial Committee.

In regard to the claim of the daughter-in-law to take the share of her mother-in-law on her death in preference to the daughters of the last full owner, it was contended that inasmuch as under the proviso to section 3 (1) the widow of a predeceased son is to inherit in like manner as a son if there is no son surviving of such predeceased son, the daughter-in law should be preferred to the daughters even as a son would be preferred to them. The learned Judges rejected the contention as according to them the words "his widow" in section 3 (1) show that the words "a Hindu" mean a male Hindu and do not include the case of a female Hindu; accordingly section 3 (1) can apply only when a male Hindu dies and has no application on the death of a female Hindu and the proviso cannot be read as an independent provision of the law so as to extend the scope of the main sub-section. It may, with respect, be pointed out that it will not be correct to treat this as a case of claim not opening on the death of a male Hindu. When a limited owner dies succession again opens out to the last full owner and such full owner in the case under notice being an intestate male it is as if the male owner died afresh in law at that point of time and there is nothing repugnant in section 3 (1) to such a claim. It would however be a different question whether section 3 (1) would admit of a claim by way of reversionary succession. Can it not be argued that finality in regard to the quantum to be taken is implied by section 3 as falling to be determined the moment the intestate actually dies and that the original sharers shall be precluded from having any further interest in the property of the intestate? The case of an illegitimate son may suggest some analogy. In *Karuppayee* v. *Ramaswami*[2] it was held that the Hindu law doctrine of "reverter" that, on the death of a female, who holds only a "woman's estate" in the property inherited by her from the last male owner, the then heir of the last male owner succeeds to his property is inapplicable to a case where his property vested on his death not in a female heir only but in a male heir also. It may be recognised at once that this view has been dissented from in *Bhagwantrao* v. *Punjaram*[3], and also that the present is not a case where the property had vested in the first instance in a female heir as well as a male heir. The question is one of intention of the legislature to be ascertained from the language of the section 3 and the learned Judges in the case under notice have held that the language does not admit of the daughter-in-law's claim by way of reversionary succession under the Act.

1. (1945) 1 M.L.J. 108 (F.C.).
2. (1932) I.L.R. 55 Mad. 856.
3. I.L.R. (1938) Nag. 255.

Horwill, J. Valia Anjuthathi Thamburatti *v.* Kalathingal Ummacha Kutty Umma.
9th August, 1945. S.A. No. 1033 of 1944.

Malabar Compensation for Tenants' Improvements Act (I of 1900), sections 6 *and* 3—*Improvements by tenants—Set off against damages for waste committed by sub-tenants—Principles.*

Malabar Tenancy Act (XIV of 1930)—Melcharth *authorising* melcharthdar *to take action against tenants and to obtain possession of the land upon redemption—If takes away* jenmi's *right to sue in ejectment and for redemption of* kudikanam.

Although the Malabar Compensation for Tenants' Improvements Act makes provision for payments for improvements, to be made direct to the sub-tenants the Act does not purport to displace the ordinary relations between landlord and tenant. If, therefore, sub-tenants commit any act of waste (as for instance by cutting trees) the tenant is liable to the landlord for the acts done by his sub-tenant in the absence of any contract between the landlord and the sub-tenants. The Act does however permit the landlord to set off against the compensation payable to a sub-tenant any sum that may be due by way of rent and damages on the land held by that sub-tenant. The right to set off carries with it a corresponding obligation to set off against the value of improvements due to a sub-tenant the damages for waste committed by that sub-tenant. Only if the value of the improvements is insufficient to compensate the landlord for damages done, would the landlord be able to have recourse against his tenant for the damages committed by his sub-tenant.

The fact that when a *melcharth* is granted, the *melcharthdar* is authorised by the deed to take action against the tenants and to obtain possession of the land on redemption, does not take away the *jenmi's* right to bring a suit in ejectment and for redemption of *kudikanam*. By granting the *melcharth* the landlord does not lose his right to protect his interests.

I.L.R. (1937) Mad. 545 : (1937) 1 M.L.J. 83 (F.B.) and 51 L.W. 569, considered.

K. P. Ramakrishna Aiyar for Appellant.

S. R. Subramania Aiyar for 1st Respondent.

K.S.

Yahya Ali, J. Rukminamma *v.* Anantha Padmanabhaswami.
21st August, 1945. A. A. O. No. 103 of 1945.

Hindu Law—Succession—Dancing girl—Female heir inheriting to—Takes an absolute and not a limited estate.

The nature of the estate that a female heir to a dancing girl will take on succession is absolute and not limited. Special features of the law applicable to dancing girls reviewed.

33 M.L.J. 207 and 71 M.L.J. 785, relied on.

N. Narasimham and *N. Ramakrishnayya* for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Wadsworth, J. Ramaswami Padayachi *v.* Vaidyanatha Aiyar.
24th August, 1945. S. A. Nos. 1707 and 1776 of 1944.

Minor—Debt due by deceased adoptive father—Natural father as de facto *guardian executing promissory note in discharge of such debts and subsequently conveying minor's property in discharge of the promissory note—If conveys valid title to the vendee—Antecedent debts binding on minor—Limitation in respect of—Cannot be extended by the promissory note of the* de facto *guardian.*

A sale by a natural father as *de facto* guardian of a minor in discharge of a promissory note executed by that guardian to discharge a still earlier debt binding on the minor (on a promissory note executed by the minor's deceased adoptive father) could not convey a valid title. The *de facto* guardian has no authority in law to execute a promissory note on behalf of the minor and the discharge of such a promissory note cannot provide the consideration for a conveyance by the *de facto* guardian to the vendee of the minor's property. Nor can the *de facto* guardian by executing a promissory note extend the period of limitation in respect of the antecedent debts contracted by the minor's deceased adoptive father. Those debts which were consequently barred by limitation at the time of the conveyance could not themselves provide any consideration for the conveyance, not being debts binding on the minor's estate.

A. S. No. 81 of 1944 (F.B.), followed.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

K. Bhashyam, T. R. Srinivasan and *R. Sundaralingam* for Respondent.

K.S.

Rajamannar, J. Meenakshi Amma *v.* Province of Madras.
24th August, 1945. S. A. No. 2217 of 1944.

Civil Procedure Code (V of 1908), *section* 80—*Notice under—Error in description of subject-matter of suit—Effect.*

In respect of a suit to set aside a revenue sale the notice under section 80 of the Code of Civil Procedure mentioned R.S. No. 722/4-b whereas the sale that actually took place and in respect of which the plaintiff claimed relief was R.S. No. 722/4-B.

Held, the particulars required by section 80 of the Code of Civil Procedure to be set out in the notice should be accurately given. The error in the description of the subject-matter is a substantial and fundamental one and a suit based on such defective notice is not maintainable.

23 L.W. 464, distinguished.

P. Govinda Menon (The Crown Prosecutor) for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) and *A. Narayana Pai* for Respondent.

K.S.

N. R. C.

Shahab-ud-din, J. China Appalaraya *v.* Venkata Subba Rao.
24th August, 1945. C. R. P. No. 1197 of 1944.

Civil Procedure Code (V of 1908), *section* 13 (b)—*Foreign decree on basis of pre-agreed compromise without any controversy—If one on merits and conclusive.*

Under French Law immoveable properties in French territory can be made liable (as security for a debt) only under a decree obtained in a French Court. A creditor in British Indian territory after agreeing to lend Rs. 525 on the security of lands which were in French territory proceeded to the French Civil Court with his borrower and obtained a consent decree for the amount which the debtor agreed to pay with interest at 8 per cent. per annum within a period of two years. The creditor had paid so far only Rs. 100 and subsequently Rs. 25. The debtor sued claiming the balance of amount agreed to be lent with interest mainly as damages for breach of contract and alternatively on the basis of specific performance of a contract to lend. In defence it was contended *inter alia* that the foreign decree was conclusive and the claim was barred.

Held, for a decree of a foreign Court to be conclusive there should be a controversy and an adjudication thereon. There was no controversy in the suit leading up to the foreign decree which was given mechanically in accordance with a prescribed rule merely recognising an arrangement already arrived at between the parties. And as that decision was not one on the merits the plaintiff's claim was not barred.

I.L.R. 52 Mad. 503, referred to. I.L.R. 40 Mad. 112, distinguished.
K. Bhimasankaram for Petitioner.
D. Narasaraju for Respondent.
K.S.

Yahya Ali, J. Arni Sri Vedapureswarar Temple *v.* Sundaresa Gurukkal.
27th *August,* 1945. S. A. No. 1087 of 1944.

Trust—Temple—Decree passed against represented by de facto *trustee—If binds temple.*

In a suit by the *de jure* trustee of a temple for a declaration that two decrees in favour of archakas for arrears of salary obtained against the temple represented by the *de facto* trustee, were not binding on the temple.

Held, that a decree could be validly passed against a temple represented by its *de facto* guardian, so as to be binding on the temple. A.I.R. 1940 Mad. 617, referred to.
T. L. Venkatarama Aiyar for Appellant.
P. C. Parthasarathi Aiyangar for Respondent.
K.S.

Horwill and Bell, JJ. Gangavva and another, *In re.*
28th *August,* 1945. R. T. No. 111 of 1945.
(C. A. Nos. 419 and 420 of 1945.)

Evidence Act (I of 1872), *section* 30—*Scope—Charge of murder—Statement of one of the accused that he buried the knife with which the murder was committed by other two accused in order to conceal evidence of murder—Is a confession of an offence punishable under section* 201, *Penal Code—Cannot be used against the other accused on the charge of murder under section* 302, *Penal Code.*

In a charge of murder against three persons the statement of one of the accused that he buried the knife with which the other two accused committed the murder in order to conceal the evidence of the murder, is a confession of an offence punishable under section 201, Penal Code. The statement though amounting to a confession of an offence punishable under section 201, Penal Code is not admissible in evidence against the other two accused on the charge under section 302, Penal Code.

I.L.R. 54 Mad. 75 : 59 M.L.J. 471 and (1937) M.W.N. (Crl.) 249, approved.
Obiter dictum of *Oldfield, J.,* in 14 L.W. 474, dissented from.
P. Basi Reddi and *S. Narasimha Aiyangar* for Accused.
The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.
K.S.

Yahya Ali, J. Suranna *v.* Somanna.
6th September, 1945. C.M.S.A. No. 29 of 1945.

Madras Debt Conciliation Act (XI of 1936), *section* 27 (1)—*Application for execution of decree—Limitation—Period occupied by proceedings before Debt Conciliation Board which ultimately dismissed the application for conciliation—Right of decree-holder to exclude.*

A decree was passed on 7th April, 1938. Two of the judgment-debtors filed an application before the Debt Conciliation Board on 1st November, 1939, and in that application they acknowledged the debt. The application was dismissed by the Debt Conciliation Board on 9th August, 1941. The decree-holder filed an execution petition on 27th July, 1943.

Held, the execution petition was "a proceeding before a Civil Court for the recovery of a debt," within the meaning of the expression in section 27 (1) of the Debt Conciliation Act and the period from 1st November, 1939 until 9th August, 1941, occupied by the proceedings before the Debt Conciliation Board in respect of that debt should be excluded in calculating the period of limitation for the execution petition.

T. S. Narasinga Rao for Appellant.
M. Rajagopalachari for Respondent.
K.S.

Chandrasekhara Ayyar, J.
4th September, 1945.

Sivapuram Sri Sivagurunathaswami Koil Trustees *v.* Sarangapani Iyengar.
A. A. O. No. 429 of 1944.

Madras Estates Land Act (I of 1908)—Padugai land—*If* " *ryoti land* "—*Suit for recovery of possession of such land from the purchaser from the lessee of the plantain crops standing on such land—Jurisdiction of Civil Court.*

Whether or not *padugai land* (which means land on the lower level bank breadth of the river between the edge of the sandy stream bed and the high flood level bank) is ' ryoti land ' within the meaning of the Madras Estates Land Act, such land though it may not be part of the river bed, may be part of the river bank, in which case also as in the case of river beds the land would not be comprised within the definition of " ryoti land".

Where a stranger has purchased only the plantain crops on such *padugai land* from the lessee, it is not open to him to contend that a suit against him and the lessee for the recovery of the land does not lie in a Civil Court but must be filed only in a Revenue Court. The fact that such purchaser was asked to pay the rent for the remaining years of the term of the lease cannot convert his status into that of a ryot.

K. S. Champakesa Aiyangar and *K. Venugopala Aiyangar* for Appellants.

S. V. Narayana Aiyar and *K. Venkataramani* for Respondents.

K.S.

Wadsworth, Officiating C.J. and Koman, J.
11th September, 1945.

Bagyalakshmi Ammal *v.* Bappu Aiyar.
L. P. A. No. 18 of 1945.

Civil Procedure Code (V of 1908), *section* 47—*Dispute between co-defendants—Appeal—Maintainability.*

An appeal is not maintainable under section 47 of the Code of Civil Procedure unless there was a conflict in the suit or the appeal therefrom between the appellant and respondent. Where a respondent bound by a decree was not a party opposed to the appellant but was supporting the appellant in her claim the case will not fall under section 47 of the Code of Civil Procedure and make the appeal maintainable.

Decision of Chandrasekhara Ayyar, J., in A. A. O. No. 283 of 1944, reversed.

T. R. Srinivasa Aiyar for Appellant.

D. Ramaswami Aiyangar and *O. K. Ramalingam* for Respondents.

K.S.

Rajamannar, J.
14th September, 1945.

Nallakumaran Pillai *v.* Badrakaliamman Koil at Sholavandan.
S. A. No. 1478 of 1944.

Religious Endowment—Person who has been acting as trustee for thirty-five years without challenge—If de facto *trustee or trustee* de son tort—*Suit by him for recovery of property of temple—Maintainability.*

A person who has been found to have been acting without any challenge as trustee of a temple for over 35 years though there is no order appointing him trustee cannot be said to fall within the category of *de facto* trustees or trustees *de son tort* who are not entitled to maintain suits for possession on behalf of the institutions of which they claim to be trustees. (1938) 2 M.L.J. 663 and (1944) 1 M.L.J. 35, distinguished.

K. Parasurama Aiyar for Appellant.

R. Ramasubbu Aiyar and *T. S. Vaidyanatha Aiyar* for 1st Respondent.

K.S.

Yahya Ali, J.
14th September, 1945.

Palanichami Nadar *v.* Governor-General of India in Council, represented by the Manager, South Indian Railway.
C. R. P. No. 1749 of 1944.

Limitation Act (IX of 1908), *Article* 31—*Suit against railway for compensation for loss of goods consigned for transit—Starting-point of limitation.*

Under article 31 of the Limitation Act for a suit for compensation for non-delivery of goods consigned for transit time (period of one year from date when the goods ought to have been delivered) begins to run from after the definite refusal or declaration of inability to deliver by the responsible railway company.

V. Ramaswami Aiyar for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

K.S.

Rajamannar, J.
17th September, 1945.

Mekkileri Koppirichi *v.* Uppoonni Thattari Kunhi Ramar.
S. A. No. 1900 of 1944 and A.A.A.O. No. 159 of 1944.

Malabar Tenancy Act (XIV of 1930), *section* 33 *and section* 2 (3)—*Suit for eviction of tenants from* kudiyiruppu—*Tenants' right to offer to purchase the rights—Limits.*

On 1st October, 1929, one *C* executed a marupat in favour of *P*. Under a document dated 21st October, 1935, *C* assigned his rights as lessee to *X* and *Y* who were members of the family of *C*. On 4th March, 1941, the landlord permitted the tenants to pull down the house then in existence and received a sum of Rs. 25 from the tenants as its value. Further he allowed the tenants to construct a new house at their own expense and agreed to give them the value of the new house at the time of the surrender of possession of the paramba. A new house was built in pursuance of the permission. Within 16 months thereof the lessor filed a suit to recover possession of the site occupied by the house and the approach to it, when the tenants claimed that they were entitled to purchase the site and the way leading to it under section 33 of the Malabar Tenancy Act. The plaintiff contended that the tenants were not entitled to the benefit of section 33 because of the provisions of section 2 (3) of the Act.

Held, (i) As the house in existence was built by the tenants at their own expense the building cannot be described as one " owned by the landlord " so as to exclude the applicability of the Act on the basis of section 2 (3).

(ii) " *Kudiyiruppu* " includes the sites of residential buildings and any easement attached thereto.

(iii) As the suit related to the site of a residential building the site having been in the continuous occupation of the tenants and members of their family for over ten years on the date of the institution of the suit they will be entitled to offer to purchase the rights in the *kudiyiruppu* of the landlord who seeks to evict them.

P. Govinda Menon (the Crown Prosecutor) for Appellants.

K. Kuttikrishna Menon (the Government Pleader) for Respondent.

K.S.

Yahya Ali, J. — Bala Naragadu *v.* Chengappa.

18th September, 1945. — C. R. P. No. 487 of 1944.

Minors—Guardian opposing compromise—Court taking the view that terms of the proposed compromise will be beneficial to the minor—Court has no jurisdiction to pass order in terms of the compromise.

The Court has no jurisdiction to enforce a compromise even though the terms of it might appear to be beneficial to the minors where the guardian objected to the Court passing a decree in terms of a compromise.

Where the application for approval of a compromise was not only not made by either the natural guardian or the guardian *ad litem* of the infant parties to a suit but it was positively opposed by them and their pleader the Court cannot pass an order in terms of the compromise. The fact that there will be some inconvenience caused if the work of carrying out the partition is directed to be done over again is not a sufficient ground for approving such compromise in the face of objections by the guardian.

I.L.R. 22 Mad. 378, relied on; 70 M.L.J. 700, distinguished.

T. K. Srinivasa Thathachari for Petitioner.

B. C. Seshachala Aiyar for Respondent.

K.S.

Kuppuswami Aiyar, J. — Labbai *alias* Sheik Abdul Khadar, *In re.*

21st September, 1945. — Cr.M.P. Nos. 811 and 812 of 1945.

Government of India Act (1939), *sections* 205 *and* 293—*Defence of India Rules, rule* 90-B, *prohibiting export of gold—If affects the Sea Customs Act—If involves any interpretation of section* 293 *of the Government of India Act—Certificate under section* 205—*If can be granted when point is raised for the first time in the application for issue of certificate.*

A certificate under section 205 of the Government of India Act may not be granted where the point sought to be raised before the Federal Court is raised for the first time in the application to the High Court for certificate. Assuming that it is open to raise the plea in the application for certificate, on the question whether the rule under the Defence of India Act prohibiting the export of gold affected the Sea Customs Act,

Held, the export of gold was constituted an offence only under the Defence of India Rules and the effect of sub-section (2) (*xxvi*) of section 2 of the Defence of India Act is to enable Government to make rules applying the provisions of the Sea Customs Act so far as the punishment was concerned. Section 2 (3) (*ii*) of the Defence of India Act provides for rules being made for the punishment in respect of such contraventions and therefore the punishment provided by rule 90 of the Defence of India Rules is one provided by the Defence of India Rules and not under the Sea Customs Act. Accordingly no question as regards the interpretation of section 293 of the Government of India Act is in any way involved and a certificate under section 205 of the Constitution Act must be refused.

V. Govindarajachari, P. S. Venkatesan, K. S. Rajagopalachari and *K. Srinivasan*, for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Koman, J. — Satyanarayana Raju *v.* Rama Raju.

21st September, 1945. — C. R. P. No. 227 of 1945.

Practice—Order on preliminary issue that suit is bad for misjoinder and direction for trial of other issues as the next stage—Succeeding judge how far bound by that order.

When a suit came up for hearing the then Subordinate Judge took up the first issue " Whether the suit is bad for misjoinder of parties and causes of action " as a preliminary issue and held that the suit was bad for misjoinder and directed that " the most convenient course is to decide issues 4, 5 and 6 as the next stage ; if they are decided in favour of defendants there will be no necessity to enter into any other question."

When the suit came on for hearing again the succeeding Subordinate Judge held that the course adopted by his predecessor was not a proper one and called upon the plaintiff to elect as to which of the defendants he intended to proceed against in the suit and give up the rest. On revision,

Held, the first order amounts to an adjudication on the first issue and it is not open to the successor to vary that order.

A.I.R. 1929 Mad. 121, applied.

P. Satyanarayana Rao for Petitioner.

P. Satyanarayana Raju and *Ch. Raghava Rao* for Respondent.

K.S.

Horwill and Bell, JJ. Srinivasacharyulu *v.* Venkatavaradacharyulu.

6th September, 1945. A. A. O. No. 194 of 1944.

Civil Procedure Code (V of 1908), *section* 47—*Scope—Mortgage decree—Purchaser of one of the mortgaged properties taking an assignment of the decree—Execution of decree—Plea of* pro tanto *discharge of the decree—Not open in execution proceedings—Equities to be adjusted only in separate suit for contribution.*

A person who had acquired the rights of the mortgagor in a part of the property subsequently became a transferee of the decree on the mortgage and sought to execute the decree for the full amount due. It was objected that the decree could be executed only for the proportionate share of the decree amount as against the other properties.

Held: The acquiring of the decree by the person who had already acquired the equity of redemption in part of the mortgaged property does not operate as a *pro tanto* discharge of the mortgage decree automatically. The judgment-debtors have nothing but an equity in their favour and questions as to such equities could not be raised in execution proceedings as they do not relate to the discharge or satisfaction of the decree. The parties must have their equities adjusted in a separate suit for contribution and the execution of the mortgage decree cannot be resisted.

I.L.R. 34 Cal. 13; A.I.R. 1936 Cal. 537; A.I.R. 1923 Pat. 44 and (1943) 2 M.L.J. 45, approved.

I.L.R. 10 All. 570; I.L.R. 49 All. 544 and A.I.R. 1934 Mad. 250, disapproved.

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Yahya Ali, J. Adi Subbayya *v.* Subba Sastri.

17th September, 1945. C. R. P. No. 1480 of 1944.

Madras Debt Conciliation Act (XI of 1936), *section* 10 (2)—*Statement of debts not filed—Discharge of debts under—If any specific order necessary—Section* 19—*Bar of execution—Scope.*

The effect provided in section 10 (2) of the Madras Debt Conciliation Act in the event of a statement of debts not having been filed, of the debts standing discharged, is statutory and follows as a matter of law, and no specific order of the Board is required for that purpose.

Non-production of accounts is covered by section 11 which postulates that where the necessary documents or entries in books of accounts are not produced such documents shall not be admissible against the debtor in any suit brought by the creditor or any person claiming under him for the recovery of the debt. The Board has no power to pass any order purporting to be under section 10 (2) discharging the debt on the ground of non-production of accounts.

Accordingly an order by the Board that "the creditor did not produce accounts and consequently it was compelled to take action under section 10 (2) of Act XI of 1936" must be ignored as *ultra vires.*

Section 19 (*b*) of the Debt Conciliation Act bars only execution petitions in which execution has been suspended under sub-section (3) of section 18 of the Act.

V. S. Narasimhachar for Petitioner.

T. S. Narasinga Rao for Respondent.

K.S.

Chandrasekhara Ayyar, J. Punna Lal *v.* Kasturchand Ramji.

17th September, 1945. S. A. No. 1980 of 1944.

Tort—Malicious prosecution and malicious house-search—Damages—Exemplary damages—If can be awarded.

The award of exemplary damages for torts (in this case malicious prosecution and malicious house-search) in cases where the defendant has acted contumaciously is sanctioned not only by English law but also by decisions of the Madras and other High Courts. (*See* 62 M.L.J. 107 and 69 M.L.J. 98.)

It cannot be said that there is no tort known as malicious house-search. There is nothing like an exhaustive classification of torts beyond which Courts should not proceed. New invasion of rights devised by the brain of man might give rise to new classes of torts. Accordingly there could be an action for procuring maliciously a house-search. A.I.R. 1917 Pat. 43, referred to.

Where it is found that the defendant was actuated by malice in prosecuting the plaintiff and the house-search was procured with a malicious motive, the existence of strained relations between the parties for a long period is a ground for the award of exemplary damages instead of refusing it.

N R C

Where the amount of damages is reduced by the first appellate Court on a wrong view the error must be set right in second appeal though if it was a mere question of amount the High Court would not lightly interfere with it in second appeal.

K. Kotayya for Appellant.

B. V. Ramanarasu for Respondent.

K.S.

Rajamannar, J. Koyakutty *v.* Kunhali.
19*th September*, 1945. S. A. No. 819 of 1944.

Civil Procedure Code (*V of* 1908), *Order* 41, *rules* 27 (c) (*as amended in Madras*) *and* 29—*Appellate Court—Summoning and examining person as Court witness—Proper procedure—Necessity to specify and record on its proceedings the points on which such evidence was to be confined before the examination took place.*

The appellate Court when summoning and examining a person as a Court witness must specify the points to which the evidence is to be confined and record on its proceedings the points so specified before the examination takes place. The extraordinary power to examine a Court witness must be resorted to only in exceptional circumstances and with the adequate safeguards laid down in Order 41, rules 27 and 29 of the Code of Civil Procedure.

The giving of reasons for summoning and examining such witness in the judgment subsequently delivered cannot amount to a fulfilment of the conditions imposed on the Court by Order 41, rule 27 (c).

34 L.W. 7 (P.C.); (1942) 2 M.L.J. 287 and A.I.R. 1937 Lah. 115 referred to.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. Bashyam and *G. Gopinath* for Respondents.

K.S.

Rajamannar, J. Venkatappayya *v.* Butchayya.
20*th September*, 1945. S. A. No. 2093 of 1944.

Limitation Act (*IX of* 1908), *section* 20 (*as amended by Act XVI of* 1942)—*Does not operate retrospectively.*

Offer in debt conciliation proceedings to pay 7 annas in the rupee (in respect of a debt with open payments which could not save limitation) not accepted by creditor cannot be treated as an agreement to pay a barred debt under section 25 (3), Contract Act.

A promissory note was dated 20th February, 1933. Payments towards the note on 25th December, 1934, and on 19th November, 1937, could not save the suit on the promissory note in 1940 from the bar of limitation. It was contended that the offer by the debtor to pay 7 annas in the rupee in proceedings before the Debt Conciliation Board could be utilised to found a claim based on section 25, sub-section (3) of the Contract Act, though such offer was refused by the creditor who claimed the full amount in the suit.

Held, (*i*) section 25, sub-section (3) of the Contract Act is based on an agreement and as the offer was refused it cannot be said that there was any agreement.

I.L.R. 23 Mad. 94; I.L.R. 33 Cal. 1047; A.I.R. 1921 Pat. 29 and A.I.R. 1923 Cal. 659, distinguished.

(*ii*) The debt having become barred by limitation long before the amendment by Act XVI of 1942 of section 20 of the Limitation Act took effect, the amendment could not be relied upon to operate retrospectively so as to revive the barred debt. (1944) 1 M.L.J. 347, relied on. It cannot be said that the creditor can rely on the Amending Act as one superseding the law as laid down in *Rama Shah's case*, I.L.R. (1940) Lah. 470 (P.C.).

N. Subramaniam, B. S. Ramachandra Rao and *D. V. Reddi Pantulu* for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Rajamannar, J. Mulla Madina Saheb *v.* The Province of Madras represented by the Collector of West Godavari.
20*th September*, 1945. S. A. No. 2030 of 1944.

Workmen's Compensation Act (*VIII of* 1923), *section* 19 (2) *and section* 12 (2)—*Principal paying compensation claiming right to indemnity from contractor—Jurisdiction of Civil Court.*

There is nothing in the Workmen's Compensation Act which makes an order for compensation to the dependants of a deceased workman to which a person like a contractor, sought to be made liable to indemnify the principal paying the compensation was not a party, binding on him for all

purposes including the liability to indemnify. An order awarding compensation is entirely distinct and different from an order allowing or disallowing a claim for the indemnity. The commissioner has jurisdiction to decide the question of liability to indemnify the principal.

Section 19 (2) of the Workmen's Compensation Act precludes the Civil Court from deciding any question which is to be decided by the commissioner under the Act. Where the principal withholds an amount due to a contractor claiming it as indemnity for compensation paid by him to a deceased workman's dependants without obtaining from the commissioner a declaration of a right to such indemnity and the contractor sues in the Civil Court for recovery of the amount so withheld the principal cannot rely on his right to indemnity in the Civil Court as he had not established the right before the commissioner. Section 19 (2) of the Act is no bar to the contractor's suit but it will be a bar to the principal asserting his right to indemnity.

K. Kameswara Rao for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Horwill and Bell, JJ. Duraiswami Koundan, *In re.*

21st September, 1945. R. T. No. 127 of 1945.

Criminal Procedure Code (V of 1898), *section* 342—*Questioning accused under—Proper procedure.*

The object of questioning the accused under section 342, Criminal Procedure Code, is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence. Unfortunately, since the Privy Council decision in *Dwarkanath* v. *Emperor,* 64 M.L.J. 466, Courts have cultivated the habit of summarising the whole evidence and asking the accused what he has to say with regard to it. A summary at considerable length tends to defeat the object of section 342, Criminal Procedure Code, because the attention of the accused is not drawn thereby to the salient features of the prosecution case that seem to call for some explanation. To an ordinary straightforward account of witnesses of an actual occurrence no detailed questionings would be necessary. On the other hand, if for example, some article is found in the accused's house which points in an emphatic manner to the accused's responsibility for the crime he should be given an opportunity of offering an explanation of the presence of that article in his house.

Giving a long precis of the whole prosecution evidence and asking the accused what he has to say with regard to it is an abuse of the provisions of section 342 of Criminal Procedure Code and an example of the misunderstanding of the Privy Council decision.

G. N. Chari for the accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Wadsworth, Officiating C.J. and Koman, J. Jagadeesam Pillai *v.* Kuppammal.

21st September, 1945. Appeal No. 296 of 1944.

Madras Estates Land Act (I of 1908) *as amended by Act (XVIII of* 1936), *section* 3 (10) *and section* 6 —*Private land—Test—Occupancy rights—When available.*

Explanation 2 to section 6 of the Madras Estates Land Act as amended in 1936 makes it clear that in respect of an inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, the expressions "new" and "commencement of this Act" shall be read as meaning the 30th June, 1934, and the expression "hereafter" shall be considered as meaning the period after the 30th June, 1934.

A ryot who has acquired an occupancy right by being in possession of his holding on the 30th June, 1934, is not entitled to an occupancy right thereafter regardless of whether or not he continues to hold the land. Section 6 (1) gives the ryot a permanent right of occupancy *in his holding.* If he has no holding he can have no right of occupancy.

Where on the termination of a lease the landlord without objection from the former tenant gave a fresh lease to another and at the end of that lease admitted the son of the second lessee to possession as tenant the inference is that the previous lessees surrendered the land at the end of the period of their leases and the person subsequently admitted into possession as tenant gets the right of occupancy contemplated by section 6 of the Act.

The definition of "private land" in section 3 (10) as amended by the Act of 1936 read as a whole indicates clearly that the ordinary test for "private" land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision.

In respect of such lands, there must be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard such lands as retained for the personal

use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights. The mere fact that the landlord owns both the varams in the lands and has been letting them out on short term leases is not sufficient to warrant such lands being treated as private lands.

History of the Tanjore Palace Estates reviewed.

V. Govindarajachari, B. V. Ramanarasu and *V. Srinivasan* for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and *A. Sundaram Aiyar* for Respondent.

K.S.

Wadsworth, Officiating C. J. and Koman, J. Subramania Chettiar *v.* The Collector of Coimbatore.
21st September, 1945. Appeal No. 328 of 1944.

Land Acquisition Act (I of 1894), section 18—Reference made under—Power of Court to go into question whether reference was made within period of limitation.

The Court has power, when a reference is made under section 18 of the Land Acquisition Act to go into the question of limitation for making such reference especially where the Collector himself has included the question of limitation as part of the reference in his letter accompanying the reference and has not decided the question himself. When a question of limitation arises in an objection to the amount of compensation it is eminently desirable that the Collector who as acquisition officer cannot be completely disinterested in such a case should refer the question of limitation to the Court. I.L.R. 47 Mad. 357 referred to; I.L.R. 52 All. 96 dissented from; I.L.R. 32 Cal. 605 (P.C.) explained; (1943) 1 M.L.J. 66 distinguished and I.L.R. 1944 Bom. 90 approved.

T. K. Subramania Pillai and *M. Annamalai* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Horwill and Bell, JJ. Chenchuramayya, *In re.*
9th October, 1945. R. T. No. 132 of 1945.

Criminal Trial—Sentence—Principles to be observed in imposing when there are alternative sentences for an offence.

If a Court has two alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which seems to it, in view of those circumstances, the more fitting. The fact that a murder was unpremeditated and the act was committed in sudden anger are circumstances which will justify the award of the lesser sentence of transportation for life.

K. S. Jayarama Aiyar and *R. Ramalinga Reddi* for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Ramayya *v.* Nagapotha Rao.
9th October, 1945. C. R. P. No. 948 of 1944.

Civil Procedure Code (V of 1908), Order 21, rules 48 and 49—Scope—Person aggrieved by order under—Remedy of—Revision—Maintainability—Rule 49—Not applicable to case of dissolved partnership.

It is difficult to hold on the language of rule 49 of Order 21, Civil Procedure Code, that there is anything in the nature of actual attachment when an order is passed under that rule. The rule provides a process in substitution of the ordinary process of attachment. An order under the rule will not amount to an attachment within the meaning of rule 58 of Order 21 for the purpose of entitling the person aggrieved to prefer a claim or an objection and if aggrieved in such proceedings to file a suit under rule 63 of that Order. In any event the remedy by way of revision can be denied only if the alternative remedy is certain, conclusive and not ambiguous. The High Court has power to interfere in revision inspite of the fact that the petitioner has another remedy.

Rule 49 of order 21, Civil Procedure Code, does not apply to the case of a dissolved partnership.

K. Subba Rao for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

Bell, J. Venkanna *v.* Kotayya.
26th October, 1945. A. A. A. O. No. 25 of 1945.

Civil Procedure Code (*V of* 1908), *section* 48 (2) (a)—*Time limit for execution—Plea of fraud to escape the bar—If can be raised for first time in appeal.*

Section 48 of the Code of Civil Procedure sets a time limit on execution. But in order to prevent a dishonest and fraudulent debtor from preventing the execution of the decree for the period of 12 years it says that if fraud can be shown then the time limit may be extended. The decree-holder can show even at the eleventh hour and afterwards (for instance in the appeal) that the time limit laid down by section 48 should not prevail, where the conduct of the judgment-debtor is such as to have prevented the execution of the decree within the twelve years. Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them. I.L.R. 44 All. 319, relied on.

Where the judgment-debtor made a fictitious sale of all his properties to his maternal uncle within an year of the decree and by reason of such alienation the decree-holder was utterly unable to execute the decree, as the alienee for 7 or 8 years filed process after process in an endeavour to prevent the decree-holder laying his hands on the property of the judgment-debtor, the plea of fraud can be allowed to be raised for the first time in appeal. 47 M.L.J. 428, relied on. Mulla's Civil Procedure Code, page 600, distinguished.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

N. Suryanarayana and *N. C. Raghavan* for Respondent.

K.S.

Bell, J. Venkatasubbarao *v.* Bujangayya.
26th October, 1945. C. R. P. No. 602 of 1945.

Arbitration Act (*X of* 1940), *section* 33—*Application under, praying that an award should be set aside—Court-fee payable.*

Court-Fees Act (*VII of* 1870, *as amended by Madras Act V of* 1922), *Schedule II, Article* 1—*Applicability.*

An application under section 33 of the Arbitration Act, 1940, praying that an award should be set aside is not provided for in the Court-Fees Act. As such an application has to be brought under some existing provision, all that can be done is to use the general article, namely, Article 1 and it is sufficient to pay a court-fee of annas 12 as on an ordinary application.

V. Rangachari for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J. Ramachandra Rao, *In re.*
26th October, 1945. Crl. R. C. No. 441 of 1945.
(Crl. R. P. No. 404 of 1945).

Madras Public Health Act (*III of* 1939), *section* 142 *and Criminal Procedure Code* (*V of* 1898), *section* 197—*Prosecution of Health Officer of Municipality for beating and abusing in the course of his duties the maistri of scavengers—Sanction—Necessity.*

A maistri of scavengers in a municipality was abused and beaten by the Health Officer of a municipality for not preventing the scavengers creating a disturbance on the pay day. In a prosecution of the Health Officer at the instance of the maistri,

Held, the act complained of must be deemed to have been done by the Health Officer in the discharge of his duties and consequently section 142 of the Public Health Act would apply and sanction would be necessary under that section for the prosecution even though such sanction may not be necessary under section 197 of the Criminal Procedure Code on the ground that the accused was not an officer who could be removed only by the Local Government.

Kasturi Seshagiri Rao for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J. Viraraghava Ayyangar, *In re.*
26th October, 1945. Crl. R. C. No. 459 of 1945.
(Crl. R. P. No. 422 of 1945).

Madras Essential Articles Restricted Acquisition Order, 1943, *section* 3 (1)—*Coming into force of order in a municipality—Bringing into Municipality of paddy purchased before the order came into force and kept in a village near by—If offence.*

The petitioner purchased some paddy at Perambur early in March 1944 and kept it there due to lack of transport facilities. He brought the paddy to Kumbakonam on 2nd April, 1944, after the Madras Essential Articles Restricted Acquisition Order, 1943, had come into force in that Municipality in the meantime *i.e.*, 14th March, 1944. In a prosecution for an offence under section 3 (1) of the order,

Held, (1) there was no "acquisition" of the paddy after the order came into force in Kumbakonam and the petitioner cannot be convicted of that offence.

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The word "acquired" in section 3 (1) of the order cannot be taken to mean "transported" into the Municipality so as to make the removing of the paddy to Kumbakonam an offence.

M. S. Venkatarama Aiyar for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. Valmiganathan, *In re.*
30th October, 1945. Crl. R. C. No. 620 of 1945.
(Crl. R. P. No. 578 of 1945).

Penal Code (XLV of 1860), section 323 and Madras District Municipalities Act (V of 1920), section 359—Charge of obstruction to municipal servant in the discharge of his duty and also of causing hurt to him—Conviction for both offences—Propriety.

If in the course of an obstruction to a municipal servant in the discharge of his duty, hurt is caused to him, the accused can be charged separately for the two offences. Where however the Magistrate makes up his mind to proceed against the accused under section 323 of the Penal Code, it will be proper for him to drop the charge under section 359 of the District Municipalities Act. I.L.R. 59 Mad. 442, distinguished.

M. Srinivasagopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. Audinarayanamurthy, *In re.*
30th October, 1945. Crl. R. C. No. 329 of 1945.

Drug Control Order (1943), clause 9 (a) (before amendment of 19-5-1944)—Sale of Allenbury's feeding bottle in violation of—Doubt as to whether "Feeders Allenbury" meant the bottle only or whether it included the teat and valve—Right of accused to benefit of.

The Drug Control Order as it stood on the date of a sale of an Allenbury's feeder bottle by the accused for Rs. 2-8-0 specified the prices in this manner:

"Feeders Allenbury" each Rs. 2.

Teats spare for above Allenbury's each Re. 0-6-6.

Valves spare for above Allenbury's each Re. 0-5-6.

In a prosecution for an offence under rule 81 (4) of the Defence of India Rules,

Held, as there was some doubt whether the "Feeders Allenbury" priced at Rs. 2 meant only the bottle without the teat and the valve or included them, the accused should be given the benefit of it.

B. Jagannadha Das for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. Satyanarayana and others, *In re.*
1st November, 1945. Crl. R. C. No. 675 of 1945.
(Crl. R. P. No. 631 of 1945).

Madras Gaming Act (III of 1930), section 6—Scope and effect—Instruments of gaming and persons found in the place searched by police under a warrant—Nature of evidence—Absence of evidence that such house was used for deriving profit—Conviction—Sustainability.

Under the definition of a "common gaming house" in section 3 of the Madras Gaming Act, the element of profit or gain is an essential ingredient and when this has been negatived by the evidence there is nothing to warrant a conviction of persons found in such a house under section 9 of the Gaming Act which postulates of course the position that the persons found there were present for the purpose of gaming in a "common gaming house."

All that section 6 of the Gaming Act says is that any instruments of gaming found in any place entered and searched under the provisions of section 5 or any person found therein shall be evidence that such place is used as a "common gaming house" and that the persons found therein were there present for the purpose of gaming although no play was actually seen by the police officer or any of his assistants. It is only a piece of evidence in support of the prosecution. But it cannot be treated as a conclusive piece of evidence warranting a conviction of the persons found there without other evidence that the place was kept or used for deriving profit or gain.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J. Kandaswami Asari, *In re.*
2nd November, 1945. Crl. R. C. No. 700 of 1945.
(Case Referred No. 36 of 1945).

Criminal Procedure Code (V of 1898), section 397—Scope—Person already under detention in a certified school—Conviction—Second detention—Commencement.

Section 397 of the Code of Criminal Procedure relates to a sentence of imprisonment, penal servitude or transportation and not to orders directing detention in a certified school. Accordingly where a person already in detention in a certified school is again convicted the detention in the second case will be concurrent with that in the first case. The detention cannot be ordered to commence at the expiration of the detention in the first case in the exercise of the powers under section 397 of the Criminal Procedure Code.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The accused not represented.

K.S.

Chandrasekhara Aiyar, J. — Yenadi *v.* Ramalakshmanamma.
23rd October, 1945. — S.A. No. 2107 of 1944.

*Inams—*Devadasi *service* inam*—Enfranchisement—Effect—If amounts to resumption and regrant—Madras Hindu Religious Endowments Act (II of* 1927), *section* 44-A.

As regards *devadasi* service *inams* there is no rule as in the case of village office service *inams* that an enfranchisement extinguishes the old title and creates a new one. An enfranchisement of a *devadasi* service *inam* under section 44-A of the Madras Hindu Religious Endowments Act does not operate as a bar to the trial of any suit or issue relating to the right as to the enjoyment of the land or the assignment of land revenue as the case may be.

K. Krishnamurthi for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Rajamannar, J. — Muhammadu Mamoona Lubhai *v.* Ramanatha Pillai.
24th October, 1945. — S. A. No. 1906 of 1944.

Mortgage deed—Construction—Othi—Clause "தொகையைக் கட்டி மீட்டுக்கொள்ளவேணுகவும்"—"*Pay the amount and redeem*"*—Amounts to a personal covenant to pay the* othi *amount enabling the mortgagee to bring a suit for sale.*

A deed contained a covenant "you shall take possession of the schedule property under *othi* for a period of six years from this day, pay the assessment due to the Government, and enjoy the property. On the expiry of the stipulated period I shall pay the amount and redeem the *othi*". (*தொகையைக் கட்டி மீட்டுக்கொள்ளவேணுகவும்*).

Held : The words clearly denote a personal covenant to pay the amount, and enables the mortgagee to bring a suit for sale.

(1918) M.W.N. 612 ; I.L.R. 56 Mad. 892 : 65 M.L.J. 194 ; (1937) M.W.N. 81 ; I.L.R. 19 Mad. 411 and I.L.R. 27 Mad. 526 : 14 M.L.J. 61 (F.B.), relied on.

(1941) 2 M.L.J. 447, distinguished.

Quaere : Whether the amendments to sections 67 and 98 of the Transfer of Property Act, are retrospective.

A. Swaminatha Aiyar for Appellants.

N. Krishnamachari for Respondent.

K.S.

Bell, J. — Venkatarama Mohandas *v.* Kondia and others.
25th October, 1945. — C. R. P. No. 561 of 1945.

Court-Fees Act (VII of 1870), *section* 17*—Plaintiff becoming owner of properties under a settlement deed executed by his father—Tenants in occupation of various portions of the property under tenancies created by settlor refusing or neglecting to attorn to plaintiff—Single suit against all of them for possession, mesne profits and ejectment—Suit comprises a number of* "*subjects*" *though similar in nature and court-fee on aggregate value must be paid.*

The plaintiff becoming the owner of properties under a settlement executed by his father found various persons in occupation of different portions of the properties under tenancies created by the settlor. Some of those tenants unlike others refused or neglected to attorn to the plaintiff. In a suit against such persons the plaint alleged that the defendants were trespassers and were bound to pay past and future mesne profits till date of delivery of possession. The plaintiff also prayed for delivery of possession and for ejectment. On a question as to the court-fee payable,

Held, the suit in the circumstances comprised a number of "subjects" as required by section 17 of the Court-Fees Act. Though the plaintiff may have one cause of action against all the defendants it cannot be said that there was only one subject, though the relief sought against the defendants may be similar.

I.L.R. 8 Cal. 593, referred to ; I.L.R. 33 Bom. 293, I.L.R. 29 Cal. 871 and I.L.R. 49 Mad. 836, distinguished.

Accordingly the plaint shall be chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable under the Court-Fees Act.

T. S. Narasinga Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *M. Appa Rao* for Respondents.

K.S.

Bell, J. — Betraya Chetty *v.* Kolandai.
26th October, 1945. — C. R. P. No. 272 of 1945.

Indian Soldiers Litigation Act (IV of 1925) *and Amendment Ordinance (LXIV of* 1942), *section* 6 (ii) *—Indian Soldier not party to litigation but materially concerned in outcome of the proceeding—Collector's certificate cannot have any effect—The Court itself must decide as to the interest or otherwise of the soldier before staying proceedings.*

The new sub-section (*ii*) of section 6 of the Indian Soldiers Litigation Act provides that where an Indian soldier is not a party to any proceeding, the proceeding may be suspended if it appears to the Court before which that proceeding is pending that the soldier is materially concerned in the

outcome of the proceeding. But no provision is made in such a case for a collector's certificate to have any effect. It is for the Court itself and for it alone to be satisfied as to the interest or otherwise of the soldier.

K. Kuppuswami for Petitioner.

Respondent not represented.

K.S.

Chandrasekhara Aiyar, J. — Vijayatunga, *In re.*
31st October, 1945. — Crl. Appeals Nos. 349 and 372 of 1945.

Penal Code (*XLV of* 1860), *section* 477-A—*Offence of falsification of accounts—Gist of—Necessity to prove that the book, paper or valuable security concerned was in the possession of the employer.*

A false statement in a letter or even in the submission of an account does not constitute an offence under section 477-A of the Penal Code. The book, paper, writing, valuable security or account alleged to have been falsified must be shown to belong to or be in the possession of the employer. In the absence of such proof the requirements of section 477-A of the Penal Code cannot be said to have been complied with.

S. Govindaswaminathan, S. Sankara Iyer and *T. K. Rajagopala Aiyangar* for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Yahya Ali, J. — Ramanujam Pillai *v.* Ramaswami Pillai.
2nd November, 1945. — C.R.P. No. 452 of 1945.

Court-Fees Act (*VII of* 1870), *section* 7 (iv) (A)—*Suit on mortgage averring that certain earlier mortgages and sales were nominal and not binding on the plaintiff—Court-fee under section* 7 (iv) (A) *on the basis of relief for cancelllation of the earlier documents—If essential.*

Unless the plaintiff is a party to a particular document and he cannot get the relief he seeks without avoiding the document, it being an insuperable obstacle in his way, it is unnecessary for him to seek the cancellation of the document; and any relief he may otherwise ask for, on the basis that the document was not intended to be acted upon and was inoperative cannot in substance and effect be treated as a relief for cancellation within the meaning of section 7 (*iv*) (*A*) of the Court-Fees Act.

In a suit on a mortgage bond though the plaintiff avers that certain earlier mortgages and sales were nominal and never intended to be given effect to and not binding on him, he is not bound to pay court-fee on the basis of relief for cancellation of the respective impugned documents.

The relationship between a mortgagor and mortgagee is that of a creditor and debtor and though in certain matters the mortgagee may be bound by certain equities binding on the mortgagor it cannot be said in general that he is for all purposes a successor or representative in interest of the mortgagor.

S. Venkatesa Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Ayisa Bivi Ammal *v.* Abdul Gani Rowther.
5th November, 1945. — Cr. M. P. No. 931 of 1945.

Child Marriage Restraint Act (*XIX of* 1929)—*Attempt to perform a child marriage—Remedy to restrain the marriage is by asking for injunction and not prosecution—There can be no offence under the Act before the marriage is actually solemnised.*

The restraint under the Child Marriage Restraint Act on solemnisation of child marriages is by punishing those who contract child marriages and those who promote, conduct, perform or direct child marriages. But before the Act could apply the solemnisation should take place. Unless the child marriage has taken place it cannot be said that any offence has been committed under the Act. Where only an attempt to perform a child marriage is alleged the proper procedure to restrain it is to apply for an injunction when the Court can act under section 12 of the Act and issue an order prohibiting the marriage.

V. Ramaswami Aiyar for Petitioners.

A. Narasimha Aiyar and *M. Srinivasagopalan* for Respondent.

K.S.

Kuppuswami Aiyar, J. — Public Prosecutor, Madras *v.* Paneswar Rao.
8th November, 1945. — Crl. R. C. No. 473 of 1945.
(Crl. R. P. No. 435 of 1945).

Criminal Procedure Code (*V of* 1898), *section* 562—*Conviction for offence under section* 409, *Penal Code* (*XLV of* 1860)—*Case cannot be dealt with under section* 562 *of the Criminal Procedure Code.*

Where a person is convicted of an offence punishable under section 409 of the Penal Code, the offence being one punishable with transportation for life the case cannot be dealt with under section 562 of the Code of Criminal Procedure.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B. S. Ramachandra Rao for Respondent.

K.S.

RADHEY SHIAM *v.* R. C. BHATTIYA, I.L.R. (1944) All. 37.

This decision is noteworthy for its animadversion of certain practices in regard to the trial of suits, which are by no means peculiar to the United Provinces. Order 9, rule 3 of the Civil Procedure Code provides that where neither party appears when the suit is called for hearing the Court may make an order that the suit be dismissed. The provisions are not mandatory but leave the matter to the discretion of the Court, see *Ram Chandra-Faraya Lal* v. *Bhaia Dharman Sahi*[1]. This is as it should be, since, in many cases the plaintiff may not be responsible for the unhappy position in which he was placed. As pointed out by Lord Penzance in *Kendall* v. *Hamilton*,[2] "Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is permitted to obstruct, and even extinguish legal rights and is thus made to govern where it ought to subserve." In the case under review, a suit triable by a Revenue Divisional Officer was posted for hearing, to a certain date at the officer's camp at a place where he had programmed to be on that date in the course of his tour. Later on, the officer decided to hear the case at another camp at a different place. Notice of the change of programme was not given to the plaintiff but was sent to the Bar Association, presumably at the officer's headquarters. The plaintiff and his pleader went to the place to which the suit had been originally posted and being apprised there of the change in the officer's programme proceeded to the new venue. But by the time they reached the place the suit had been called and dismissed. Order 5, rule 10 of the Civil Procedure Code affords a clue to the mode in which notices are to be given. There can be no dispute that a party should not suffer by what was not brought to his knowledge. In the words of Lord Cairns, L.C., in *Roger* v. *The Comptoir D'Escompts De Paris*[3], "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors." In *Mahomed Khan* v. *Mt. Sardar Begum*[4], it was held that the mere fact that the Judge put down in his order of remand that the parties were to appear before the lower Court on a certain date does not prove that the direction was "actually conveyed" to the counsel of the parties or to the parties by the counsel concerned. A similar conclusion seems to be warranted where the notification of the change in regard to the venue of hearing was merely put up at the Bar Association. The trial of a suit in camp by itself imposes handicaps on the parties by reason of the absence of a suitable library for purposes of reference, the difficulty of getting legal assistance and other factors. When on top of these there is also absence of satisfactory notice to the party affected, of the change in regard to the place of hearing, the dismissal of the suit for non-appearance of the plaintiff would be difficult to justify. In coming to that conclusion, Malik, J., observed in the present case: "There is no provision in the Civil Procedure Code for service of notice by sending such general notices to the Bar Association and there is no law under which such notices can be deemed to be sufficient. I am informed that this is the general practice in the revenue Courts. All that I can say is that if this is the practice it is very unsatisfactory. The practice of hearing cases in camps at a distance from the headquarters causes great hardship to litigants and they have to pay additional fees to the lawyers. The cases are not heard in a proper atmosphere, nor can there be any library on hand."

BHAGWAN DAS *v.* BITTAN, I.L.R. (1945) All. 148.

The point involved in the decision, commonplace though it is, is still one that often arises and in regard to which there is no uniformity of approach. One *R*, a widow, purchased a house for Rs. 398-12-0. Within less than three months of

1. A.I.R. 1936 Pat. 437.
2. (1879) 4 A.C. 504.
3. (1871) L.R. 3 P. C. 465, 471.
4. A.I.R. 1935 Lah. 163.

the purchase she sold it to one *B* for a sum of Rs. 499-0-0. The validity of the alienation being challenged, it was urged, firstly, that the property in question was the stridhana of the widow, and secondly, even if it was not, the transaction was supported by legal necessity. It was found that the vendor was about 50 years old, that the vendee was a trusted servant of the family, that no relation of her husband was present at the time of the alienation and that the house had been acquired from the savings effected by the widow out of the income accruing to her from her husband's property. It was held by the learned Judges that, in the circumstances, the burden lay upon the purchaser of proving that the house in question was the stridhana of the widow. It may, with respect, be pointed out that the conclusion is rather difficult to follow. If the suggestion be that the circumstances give rise to a presumption of over-reaching or undue influence on the part of the vendor, it is hard to accept. The sale was for nearly Rs. 100 more than what was paid by the widow herself within three months before the transaction. There was nothing to suggest any unfair advantage being gained against the widow. The fact that the vendor was a *trusted* servant would tend to support his *bona fides* and allay rather than raise suspicions against him. The age of the widow was only fifty and there is no question of an old woman being misled. The absence of any relative of the husband would be immaterial and without significance if the property was in fact stridhana. The observation of the learned Judges that "it is settled law that it is for the transferee from a limited owner to establish justification for the transfer" suggests in the context that what ought to be proved is really assumed, namely, that *vis a vis* the property in suit the widow was in the position of a limited owner. The real question would be whether the purchase of the property by the widow from the accumulated savings of income derived from her husband's property, would make it an increment to her husband's estate. It has been repeatedly held that it depends on the widow's intention. A large number of cases have declared that there is a presumption that her intention is to regard it as her stridhana. It is thus stated : "The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow, the presumption is none the less so when the fund with which the property is acquired is one, which though derived from her husband's property was at her absolute disposal . . . . . Her absolute power of disposition over the income derived from her limited estate being now fully recognised, it is only reasonable that in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income."[1] The ruling of the Privy Council in *Isri Dut Koer* v. *Hansbatti Koerain*[2], which is often considered as affording support to a contrary view only lays down that "if she has made no attempt to dispose of them in her lifetime there is no dispute but that they follow the estate from which they arose." This observation does not warrant the view that even where such disposal has been made it would still be for the transferee to show that the widow intended to regard her purchases from the income of the husband's estate as her stridhana. The observation in *Nabakishore Mandal* v. *Upendra Kishore Mandal*[3], that though it would be true that in regard to property acquired from the accumulated savings from the income of the property which she received from her husband, it would be possible for her to so deal with it that it would remain her own "yet it must be traced and shown to have been so dealt with" does not again suggest that till it is done there will be a presumption that the acquisition should be treated as an accretion to her husband's estate. This conclusion receives support from the observations of Lord Phillimore in *Rajah of Ramnad* v. *Sundara Pandiyaswami Tevar*[4] where it was stated : "A widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case

1. *See* Mulla's Hindu Law, 9th edition, p. 173; *Akkanna* v. *Venkayya*, (1901) I.L.R. 25 Mad. 351, etc.
2. (1884) L.R. 10 I.A. 150 : I.L.R. 10 Cal. 324 (P.C.).
3. (1922) 42 M.L.J. 253 (P.C.).
4. (1918) 36 M.L.J. 164 : L.R. 46 I.A. 64 : I.L.R. 42 Mad. 581 (P.C.).

has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property." There does not therefore seem to be any justification for holding that purchases by the widow from the income of her husband's estate will not be stridhana even where she has disposed of such purchased property in her lifetime.

COLLECTOR OF MEERUT *v.* HARDIAN SINGH, I.L.R. (1945) All. 204.

It was held in this case that a transfer of property in favour of a ward of Court is perfectly competent and though the vendee will be under no personal liability to pay the unpaid purchase money the statutory charge provided by section 55 (5) (*b*) of the Transfer of Property Act can be enforced against the property sold. The question arose under the United Provinces Court of Wards Act (Act IV of 1912). Section 37 of the Act lays down that "a ward shall not be competent to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court of Wards, or to enter into any contract which may involve him in pecuniary liability." The provision in the Madras Court of Wards Act (Act I of 1902) section 34 (*a*) is in almost identical terms; only it contains after the words "pecuniary liability" the additional words "personally or in respect of such property." There is nothing in the language of these sections to indicate that the legislature intended to prohibit a ward from becoming a transferee of property. Nor is there a prohibition postulated anywhere else. Section 7 of the Transfer of Property Act provides that every person competent to contract and entitled to transferable property is competent to transfer such property. But it is nowhere said that a person not competent to contract is incapable of being a transferee of property. In the case of a minor, for instance, it has been repeatedly held that a duly executed transfer by way of sale in favour of a minor who has paid the consideration money is not void and is enforceable by him, *Ulfat Rai* v. *Gouri Shankar*[1], *Munni Koer* v. *Madan Gopal*[2], *Narain Das* v. *Mt. Dhania*[3], *Munia* v. *Perumal*[4]. Though a person is disqualified to enter into a contract such a disqualification has nothing to do with his capacity to be a transferee. Totally different considerations arise where a matter passes from the domain of contract into one of conveyance. It is true that the purchase money cannot be recovered either as a personal liability of the vendee or as against his other property. But there is no bar against the enforcement of the vendor's lien for the unpaid purchase money against the property sold. It is not the case of a disqualified person *creating* a charge; it is a case where the charge arises *by operation of law*, and that not against property of which the Court of Wards had assumed superintendence but against property which is acquired after such assumption of jurisdiction.

EMPEROR *v.* BHAGWAT SARUP, I.L.R. (1945) All. 272.

The relative scope of sections 5 and 6 of the Child Marriage Restraint Act has been the subject of conflicting views. Section 5 provides for the punishment of "whoever performs, conducts or directs a child marriage." Section 6 states that where "a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised or negligently fails to prevent it from being solemnised, shall be punishable." In *Munshi Ram* v. *Emperor*[5], the Allahabad High Court took the view that the applicability of one or other of these two sections depended on whether the marriage was not or

1. (1911) I.L.R. 33 All. 657.
2. (1916) I.L.R. 38 All. 62.
3. (1916) I.L.R. 38 All. 154.
4. (1911) I.L.R. 37 Mad. 390.
5. (1936) I.L.R. 58 All. 402.

was contracted by the minor himself. If the marriage was not contracted by the minor himself but was arranged by others, section 5 would be attracted and it would apply not only to such persons as priests and strangers but also to the parents of both the bridegroom and the bride. In *Public Prosecutor* v. *Rattayya*[1], the Madras High Court held that sections 5 and 6 were intended to deal with different classes of persons, that section 5 would apply to persons other than the parents of the minor and that section 6 alone applies to the parents. The same view was taken in Nagpur in *Ganpat Rao* v. *Emperor.*[2] It is, with respect, submitted that the latter view seems to be more in accord with the language and intendment of the sections. The expression "where a minor contracts a child marriage" is not to be understood literally, inasmuch as the definition of "contracting party" in section 2 (*c*) of the Act as "either of the parties whose marriage is or is about to be hereby solemnised" suggests that "contracting" merely refers to the formation of the tie of marriage and not to the exercise of any personal volition by the parties between whom the marriage takes place. This is also consistent with the fact that in a Hindu marriage the bride is more or less a passive party and is the subject of a donation or dhana by her parent or guardian. It would therefore be incongruous to talk of her as *contracting* a marriage in the literal sense of the term "contract." That apart, in regard to the acts punishable, section 6 covers a wider field than section 5. Under the latter section it is only "performing, conducting or directing a marriage" that is punishable; and these will not subsume preparatory or preliminary acts such as negotiations which precede the settlement of a marriage, see *Sheikh Haidar* v. *Syed Issa.*[3] Section 6 on the other hand makes punishable the promoting—which will include even acts preliminary to the actual marriage—as well as negligently failing to prevent a child marriage. The larger responsibility can evidently be placed only on the parents or guardians natural or *de facto*. In that view, it is clear that section 5 is intended to deal with persons other than the parents or guardians and section 6 alone applies to the latter. In the case under notice the father of a girl under 14 years of age and her grandfather were charged with having committed an offence under section 6 and it was argued that the girl could not be deemed to have "contracted the marriage" in the sense in which that expression was sought to be construed in *Munshi Ram's case*[4] and therefore the parties were not liable. The contention was repelled. It was held that there being a child marriage, section 6 will apply so far as the father of the girl was concerned because he was in charge of the girl and had negligently failed to prevent the marriage. The grandfather was acquitted on the ground that while the father was alive he, the grandfather, could not be deemed to be in charge of the girl. As a proposition of law this may require to be qualified for though in a legal sense the father *qua* father may be the guardian of the girl and in charge, still as often is the case with Hindu joint families the grandfather might be the effective head of the family and manager and in *de facto* charge of all the affairs of the family.

EMPEROR *v.* KESRI CHAND, I.L.R. (1945) All. 450.

Interesting questions sounding in psychology and ethics, such as whether as between the giver and the acceptor of illegal gratification who is more culpable and how far the laying of a trap to detect such offences would be justified, arose for consideration in the case under notice. At first blush, it looks as if the first of these questions must depend on the circumstances of each case and the relative culpability of the parties will turn on who was the tempter and who was the tempted in the particular case. Chapter XI of the Indian Penal Code which deals with offences by or relating to public servants makes the receiving of bribe an offence but does not punish the giving of one as a substantive offence. A giver under

1. I.L.R. (1937) Mad. 854.
2. A.I.R. 1932 Nag. 174.
3. I.L.R. (1939) Nag. 241.
4. (1936) I.L.R. 58 All. 402.

the Code can however be punished as an abettor—*see* section 109, illustration (*a*)—and the same punishment can be awarded too. According to the authors of the Code, the reason for not treating the giving of a bribe as a substantive offence in India is that, while in countries where the people are independent the giver is generally the tempter and the receiver is the tempted, in India, the receiver of bribes is usually the tempter. The givers "give bribes . . . . . from exactly the same feeling which leads them to give their purses to robbers or to pay ransom to pirates". The receipt of bribes in such a country therefore savours of extortion and the authors were "strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who unless temptation had been put in his way would have acted uprightly". It would thus seem that according to the authors of the Code, giving is relatively less culpable at any rate in this country in view of its facts of life. The case under review discloses conflicting views. Iqbal Ahmad, C.J., rightly points out that the measure of punishment always depends on the degree of shock to the conscience of society or the state which the offence produces and that the giver and the taker of the bribe both work in unison and it is their concerted action which produces a result constituting a menace to society. The learned Chief Justice went on to add : "There can be no question of acceptance of illegal gratification unless there is some one to offer such gratification. *The ball . . . . . . is set rolling by the person who offers the bribe, and as such he is the primary culprit.*" Apropos of this point, Malik, J., observed : "At the same time we have to bear in mind that the *conduct of the officer accepting the bribe is probably more reprehensible* than even the conduct of the contractor who gives the bribe". At another place the learned Judge remarked : "To my mind the proper way of putting down this evil is to punish not only those who offer bribes *but still more severely those who take bribes*". It may, with respect, be suggested that neither of these views would be strictly accurate but that it really depends on who is the tempter and who is the tempted, which again will be a question of fact turning on such factors as the status of the people concerned, the education they have received, the degree of independence from or subservience to executive authority they enjoy, etc.

As to detection of corruption by laying traps, in *The King* v. *Mortimer*,[1] Lord Alverstone, C.J., had remarked : "The particular transaction of which evidence was given was the result of a police trap, and though I do not like police traps any more than any one else, still it is only fair to remember that it is almost impossible to detect this class of offences in any other way". In *Emperor* v. *Chaube Dinker Rao*,[2] referring to the trap which in that case was laid by a judicial officer, it was observed: "The plan of tempting and trapping the accused was objectionable and should not have been resorted to by an officer of the judicial department". In the case under notice, the learned Chief Justice thought that no exception could be taken to the setting of traps to detect corruption by persons other than judicial officers. Malik, J., expressed a slightly different view by suggesting that where detection is made through the setting of a trap that circumstance may have a bearing on the question of punishment. He said : "It has been argued before us that it is impossible to detect bribery unless traps are laid. This is largely true even though one may dislike such traps. But at the same time where the facts disclose that the bribe was solicited, even with the object of getting a man caught and punished, it would, to my mind, render the abetment less culpable than it would otherwise be". Thus it would seem that the propriety of laying traps for the detection of corruption will largely depend on who sets the traps; and, in any event, that may be a circumstance to be considered in awarding punishment.

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1. (1911) 1 K.B. 70.
2. (1933) I.L.R. 55 All. 654.

ALLAHABAD BANK LTD. *v.* MAHARAJ KISHORE KHANNA, I.L.R. (1945) All. 506.

Two of the questions that fell to be considered in the above case were (*i*) whether the power to appoint a receiver of property would carry with it the power to dismiss him and (*ii*) whether an appeal will lie in respect of such an order. There is no express provision in the Code of Civil Procedure conferring power on the Court to dismiss a receiver appointed by it. Order 40, rule 1 (*a*) merely states that where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property, whether before or after decree. Likewise Order 43, rule 1 (*s*) provides that an appeal shall lie from an order under rule 1 of Order 40. In *A. V. John* v. *Agra United Mills, Ltd.*,[1] it was held that the Court which has power to appoint is also invested with the power to dismiss. In effect the order of dismissal should be deemed to be one passed under Order 40, rule 1, which will mean that there is a right of appeal, see *Sripathi Datta* v. *Bibhuti Bhusan Datta*[2]. This view is shared by the Rangoon High Court in *Abdul Khader* v. *R. M. P. Chettyar Firm*[3]. In *Manomohan Neogy* v. *Surendra Kumar Roy Chowdhury*[4], it is, however, held that the Court may in the exercise of its discretion make any order discharging or removing a receiver and the receiver has no right of appeal against the order of removal passed by the Court appointing him. In the case under notice it was held that the Court which appoints the receiver has also the power to remove but it was felt that it was not necessary to consider whether an appeal can be carried from such order, in the view which the Court took on the other aspects of the case.

KING *v.* KING, I.L.R. (1945) All. 620.

On the question whether the rule in *Russell* v. *Russell*[5] is applicable in India there is much conflict of opinion. It was laid down in that case by the House of Lords that there being a presumption in law that the child of a married woman was begotten by her husband, neither the husband nor the wife can be permitted to give evidence tending to bastardise the child born during wedlock. Evidence of non-access can be shown only by evidence *aliunde*. The law governing the proof of the legitimacy of a child in India is found in section 112 of the Evidence Act, according to which the birth of a child during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Under section 120 of the Act the parties to a suit and the husband or wife of any party are competent witnesses in all civil proceedings. *Prima facie* there is nothing in the Evidence Act, which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that the child born during the continuance of the marriage to the wife is really a bastard. In *John Howe* v. *Charlotte Howe*[6], a Full Bench of the Madras High Court had taken the view that whatever may be the common law of England, in regard to the matter, under sections 118 and 120 of the Evidence Act, both the parties to divorce proceedings will be competent to give evidence as to non-access and the consequent illegitimacy of the child. This opinion had no doubt been rendered before the decision of the House of Lords in the *Russell case*[5], but even after that ruling the Madras High Court has stuck to that view. In *Mayandi Asari* v. *Sami Asari*,[7] it was held that in a case of disputed legitimacy there is nothing contrary to law in the mother of the child giving evidence as to

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1. A.I.R. 1931 All. 72.
2. (1926) I.L.R. 53 Cal. 319.
3. (1938) Rang. L.R. 586 : A.I.R. 1938 Rang. 387.
4. (1933) I.L.R. 60 Cal. 162.
5. (1924) A.C. 687.
6. (1913) 25 M.L.J. 594 : I.L.R. 38 Mad. 466 (F.B.).
7. (1931) 61 M.L.J. 874 : I.L.R. 55 Mad. 292.

access or non-access. And in *Purna Hanumantha Rao* v. *Ramachandrayya*,[1] the same view has been expressed. The Allahabad High Court has in *Doutre* v. *Doutre*,[2] reached a similar conclusion. In *Joseph Anthony Sweeney* v. *Mercy Beatrice Catherine Sweeney*,[3] the Calcutta High Court has taken a contrary view and held that the rule in *Russell* v. *Russell*[4] is applicable in India and will govern not only cases where the legitimacy of the child is directly in issue but also proceedings instituted in consequence of adultery. The opinion of the Lahore High Court is to the same effect. In *Chamarette* v. *Chamarette*,[5] it was laid down that in a divorce case where the paternity of the infant is in question neither spouse can give evidence of non-intercourse after marriage which would tend to bastardise the child born in wedlock. The Bombay view also seems to be similar, see *Premchand Hira* v. *Bai Galal*.[6] In the case under review, the admissibility of the evidence arose in connection with divorce proceedings and the Allahabad High Court followed its own earlier ruling. The main argument for holding that the rule in *Russell's case* applies to India rests on the language of section 7 of the Divorce Act. That section states: "Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules, which in the opinion of the said Courts are as nearly as may be, conformable to the principles and rules, on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief." The question therefore is whether this section warrants the importation into this country of the English common law rule laid down in *Russell's case*. In this country the principles of the law of evidence are set out in the Evidence Act. This Act declares the competency of the husband and wife as witnesses and section 112 lays down the rule regarding the presumption of legitimacy. The Evidence Act is a code which not only defines and amends but also consolidates the law of evidence—*see* Preamble. The proper approach will therefore be to start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England. Section 1 lays down that the Act is applicable to the whole of British India and applies to *all judicial proceedings in or before any Court*. As pointed out by the Select Committee the provisions of the Act are based on the English law of evidence modified to suit India and are exhaustive. "Under the Evidence Act, admissibility is the rule and exclusion the exception and circumstances which under other systems might operate to exclude, are under the Act to be taken into consideration only in judging of the *value* to be allowed to evidence when admitted"—see *R* v. *Mona Puna*[7]. It may also be remembered that while the Divorce Act is of the year 1869 the Evidence Act is a later enactment, Act I of 1872. Also the rule in *Russell's case* is only a rule of evidence and the provisions of section 7 of the Divorce Act can have advertence only to the substantive rules and principles peculiar to the law of divorce applicable in England and not to the rules of the other branches of law, such as the rules of evidence, regarding which there is an exhaustive statutory enactment here.

SECRETARY OF STATE *v.* KRISHNA RAO, (1945) 2 M.L.J. 352 (P.C.).

The nature of a srotriyam and its character came up for examination in this case by the Judicial Committee. Literally, a srotriyam means a grant in favour of a Brahmin learned in the vedas. In course of time it came to include assignments to servants of Government, civil or military, irrespective of the religion or caste of the grantee, as rewards for services rendered, see *Sundaramurthy Mudali* v. *Valla-*

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1. (1944) 1 M.L.J. 285.
2. I.L.R. (1939) All. 573.
3. (1935) I.L.R. 62 Cal. 1080.
4. (1924) A.C. 687.
5. A.I.R. 1937 Lah. 176.
6. (1927) I.L.R. 51 Bom. 1026.
7. (1892) I.L.R. 16 Bom. 661, 668.

nayaki Ammal.[1] In fact in the case under notice, the srotriyam grant was made for services rendered by the grantee as Head Sarishtadar of a district. What passes under the grant, whether it is the melvaram only or the soil itself, must necessarily be a question depending on the terms of the grant. In *Narayanaswami Naidu* v. *Secretary of State*,[2] where a village had been granted as a srotriyam to the holder of the office of nattuvar on the abolition of that office and the inam was subsequently enfranchised by the Inam Commission who issued a title deed with the words "besides poramboke", in regard to the quantum of the grant, the Madras High Court held that the inam would not convey, despite the language used, the right to the bed of a stream passing through the village. It is true that the inam title deed cannot convey more than what had passed under the grant—see *Secretary of State* v. *Srinivasachariar*[3]—but certainly the use of the words "besides poramboke" would be a circumstance indicating that there was no reservation by Government and if the grant was of the soil there can be no question that the grant will include the grantor's rights in tank, river and channel poramboke. In the present case no formal cowle was ever issued. It was in evidence that the grant was for three lives orginally, *i.e.*, to the grantee and his next two heirs. The inamdar accepted enfranchisement at the time of the Inam Commission's investigation and the inam was confirmed to the grantee in perpetuity the tenure being converted into a free-hold, subject only to the payment of the annual quit rent then fixed. It was contended by Government that having regard to the intention of Government to grant the inam for three lives only it would not have been a grant of both varams but would be of the melvaram only. In the words of the Judicial Committee, it is now well established by decisions of the Board, firstly, that a srotriyam grant may be either of the melvaram only or it may be of the proprietary rights ; secondly, that if the original grant gave only the melvaram the subsequent proceedings of the inam commission will not change its character or vest in the inamdar a subject-matter not belonging to him. The Privy Council went on to point out that inasmuch as in the present case there was no document of grant the extracts from the inam register would be "the best evidence of the true character of the grant". Their Lordships also point out that even if the grant was to enure for a limited period only, that would not be inconsistent with the passing of the full proprietorship to the grantee for that period. But in view of the fact that the inam had been converted into a freehold and confirmed in prepetuity as shown by the proceedings of the inam commission the point had lost much of its force. Incidentally their Lordships also re-affirm the view expressed in the *Swamigal case*[4] that Madras Act VIII of 1869 created no presumption that the view entertained by the inam commission as to the character of the particular grant as conveying both varams was unfounded.

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1. (1864) 1 M.H.C.R. 465.
2. (1912) 24 M.L.J. 36.
3. (1920) 40 M.L.J. 262 : L.R. 48 I.A. 56 : I.L.R. 44 Mad. 421 (P.C.).
4. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).

In the Goods of William Beechy, I.L.R. (1944) All. 229.

In this case the Allahabad High Court has, if we may say so, rightly adopted the view of the Bombay High Court in preference to that of the Calcutta High Court. The question was as regards the court-fees payable on Letters of Administration. The application for the issue of the Letters was made on 27th July, 1943. The Court-fees Act was amended in the United Provinces as from 1st August, 1943, and the amount due as fees was thereby increased. The point was raised whether the court-fees on the Letters of Administration should be paid in accordance with the Act as it was before the amendment or under the amended Act. On that question the Calcutta High Court has taken the view in *Thaddeus S. Nahapiet* v. *Secretary of State*[1], that the scale of fees should be computed as on the date of the presentation of the application, that is under the unamended Act, while the contrary view found favour with the Bombay High Court in *Gangaram Tillockchand* v. *The Chief Controlling Revenue Authority*[2]. Neither the language of section 19-I of the Court-Fees Act nor the principle underlying the collection of duty on Letters of Administration would seem to justify the Calcutta view. As Crump, J., remarked in the Bombay case, the fee in such cases is payable upon the grant of probate or Letters and not on any application therefor, and clause (1) of section 19-I of the Court-Fees Act clearly provides that "No . . . . Letters of Administration shall be made . . . until . . . the Court is satisfied that the fee . . . has been paid." Consequently the fee payable should be taken to be in a state of flux till it is actually paid. To say as the Calcutta Judges did that the application originally presented became perfected by the payment or that the petitioner acquired a right to get the Letters subject to the payment of duty as on the date of the application will be to put the cart before the horse. The analogy of court-fees being collected in pauper suits as on the date of the original application (see *Kaman Mada* v. *Malli*[3]) will be misleading, for in the latter case the court-fee is payable on the plaint, and as the suit takes effect from the date of the application it is the scale of fees prevailing on that date which is material. But here the levy is on the *grant*, and the date of the application is consequently immaterial. Strangely enough the Calcutta judges placed reliance on the earlier decision of that Court in *Swarnamoyee Debi* v. *Secretary of State*[4], which on examination however does not support their view. In that case, it was merely held that in respect of such grants the full fee payable should be determined by reference to the point of time when the grant was made. The other argument on which the Calcutta Judges based their conclusion, namely, that the Court-fees Act being a taxing statute should be construed strictly and in favour of the subject is equally irrelevant, because for one thing it is not a case of ambiguous legislation, and further it may be that in a given case the amendment may reduce the fee chargeable. There can hardly be any principle in allowing the suitor to have a choice in the matter of payment of court-fees. Any discussion of the subject with reference to the retrospective effect of an Amending Act, and whether the Court-Fees Act is a law of procedure or law affecting substantive rights will be equally irrelevant, as the language of the enactment seems to be fairly clear that the duty should be determined and paid at the time of the grant of Letters of Administration. Although the decision under notice does not contain a discussion of the question in all its aspects the preference for the Bombay view would appear to be fully justified.

Ram Gopal v. Govind Das, I.L.R. (1944) All. 397.

This case is a useful illustration of the principle that a "gentlemen's agreement" cannot always be enforced in a Court of law. But making every allowance for the rule forbidding the enforcement of wagering contracts it is somewhat difficult to follow the reasoning as regards the return of the deposit amount. The facts were of the common variety: the up-country constituent contracted to purchase certain

1. A.I.R. 1924 Cal. 987: 39 C.L.J. 209.
2. (1927) I.L.R. 52 Bom. 61.
3. (1925) 49 M.L.J. 538.
4. (1916) I.L.R. 43 Cal. 625.

bales of cotton through a Bombay firm of commission agents and had deposited a certain amount with the latter. It was admitted that from the very inception the parties had agreed that no delivery was to be made and consequently the wagering nature of the contract was beyond dispute. On this footing the commission agents' claim to recover the losses due to them was rightly negatived. But the further question arose whether the dealer, namely the up-country constituent, was entitled to succeed in his suit for recovery of the deposit made by him. It was held by the Judge following the earlier decision of the same Court in *Chhanga Mal* v. *Sheo Prasad*[1] that it was impossible to give any relief to the plaintiff as both parties were "*in pari delicto*."

It is submitted with respect, that the conclusion arrived at on the latter point is open to criticism. No doubt as Mansfield, C.J. observed in *Holman* v. *Johnson*,[2] "if from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive rule of law, there the Court says he has no right to be assisted." But the real question is whether the plaintiff requires any assistance from the illegal transaction to establish his claim. In the case on hand the plaintiff had paid the deposit for the contract which turned out to be unenforceable. As there was no plea of appropriation of the monies by the defendants the plaintiff could well ignore the illegal transaction and the substance of the suit will be a claim for money had and received. On the other hand it was probably to the interest of the defendant to give particulars of the contract and how the monies could be retained by him. Consequently there is no reason why the plaintiff should be disentitled from recovering the deposit amount.

The decision of the Madras High Court in *Boominathan Chettiar* v. *K. S. N. Chari & Co.*[3], is a strikingly analagous case. It was held there following the rule in *Universal Stock Exchange* v. *Strachan*,[4] that while a wagering contract cannot be enforced a deposit made by one gambler with the other as security could be recovered, unless the amount had in fact been appropriated for the purpose for which it was deposited. The outermost limit for such recovery is therefore the appropriation by the other party in respect of the contract already executed. The theory of appropriation was apparently not canvassed in the case on hand and consequently there is no reason why the plaintiff seeking to recover the deposit should be held to be disentitled to relief. The rule of "*in pari delicto*" on which reliance was based is confined to cases where the party has to allege the illegal contract as part of his cause of action, and not as here when he sues for recovery of the amount *de hors* the illegal transaction. The earlier decision of the Allahabad High Court in *Chhanga Mal* v. *Sheo Prasad*,[1] which was relied on by the learned judge contains no discussion of the subject beyond a reference to section 65 of the Contract Act, and it was in its turn based on an early Bombay case. (*Dayabhai Tribhovandas* v. *Lakmichand*)[5]. But that very case is an authority for the position that the rule of "*in pari delico*" is inapplicable to such cases. No doubt if the advance is made refundable in terms of the wagering contract itself as in *Guranna Sahib* v. *Appala Naidu*[6] the claim will be unenforceable. The decisions of the Madras High Court in *Venkataraju* v. *Ramanujam*[7] and *Boominathan Chettiar* v. *K. S. N. Chari & Co.*,[3] (see also *Maung Po Hnein* v. *Maung Aung Mya*[8]) would seem to lay down the correct rule on the point. There being no fraud or corruption on the part of the plaintiff, and no appropriation of the monies on the part of the defendant towards the executed contract the plaintiff will under the general law be entitled to recover the monies from the defendant, who has no manner of right to retain them. Looked at from this point of view the case on hand will undoubtedly require reconsideration.

[END OF VOLUME.]

1. (1920) I.L.R. 42 All. 449.
2. (1775) 1 Camp. 343.
3. (1944) 1 M.L.J. 188.
4. (1896) A.C. 166.
5. (1885) I.L.R. 9 Bom. 358.
6. A.I.R. 1928 Mad. 434.
7. (1917) 34 M.L.J. 561.
8. (1926) I.L.R. 3 Ran. 543.

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NOTES OF RECENT CASES.

Bell, J. President, Hindu Religious Endowments Board, Madras *v.* Srinivasa Iyengar.
16th March, 1945. C. R. P. No. 1416 of 1944.

Hindu Religious Endowments Act (II of 1927), *section* 84 (2)—*Application under to set aside or modify a decision of the Board—Nature of—Limitation Act (IX of* 1908), *section* 12 (2)—*Applicability—Time taken for obtaining copy of Board's decision—Can be excluded in computing limitation for such application.*

An application under section 84 (2) of the Hindu Religious Endowments Act made to the Court to modify or set aside a decision of the Board is an appeal to which section 12 (2) of the Limitation Act applies. Accordingly the time requisite for obtaining a copy of the decision of the Board must be excluded from the period of one year provided by section 84 (2) of the Hindu Religious Endowments Act for such an application.

The Advocate-General (*P. V. Rajamannar*) and *M. Chockalingam* for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

K.S.

Wadsworth, J. Moidin Kutti *v.* Narayana Unni Moopil Nayar.
10th April, 1945. A. A. O. No. 247 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 19—*Compromise decrees—Scaling down—Principles.*

In a suit filed in 1932 for Rs. 3,000 due on a mortgage executed for Rs. 1,600 in 1922, a compromise decree was passed on 21st July, 1933, providing that the plaintiff would give up the whole amount of the suit claim and Court costs except for Rs. 2,500. If the defendant paid before a certain date the plaintiff would give up a further sum of Rs. 500. Failing that, the whole amount of Rs. 2,500 would be realised by the sale of the properties in the plaint schedule. On an application to scale down the compromise decree,

Held, that it is incumbent upon the debtor to prove the extent to which interest is available for cancellation and the extent to which the compromise figure can be deemed to be a renewal of the antecedent liability. In the absence of any waiver by the mortgagee of his claim for costs, the judgment-debtors cannot say that the compromise figure is a renewal of the antecedent liability to the extent of the amount of costs (about Rs. 500). The balance of the amount decreed must necessarily have been made up of the principal and interest of the mortgage debt and the debtor is entitled to the scaling down and amendment of the decree so as to provide for the payment of Rs. 1,600 with interest thereon at 5 per cent. from 1st October, 1937, and for Rs. 500 being the amount of costs with interest thereon at 5 per cent. from the date of the decree 21st July, 1933 to 22nd March, 1938, the date of the commencement of the Act and thereafter at 6 per cent.

Judgments in A. A. O. No. 491 of 1939 and C. R. P. No. 2316 of 1939, applied. Judgment in A. S. No. 235 of 1941, distinguished.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondent.

K.S.

Bell, J. Sriramamurti *v.* Sanyasi Raju.
20th April, 1945. C. R. P. No. 882 of 1944.

Civil Procedure Code (V of 1908), *Order* 33, *rule* 5 (d1)—*Question as to age of pauper petitioner for deciding whether suit was barred by limitation—Power of Court to hear evidence and decide.*

Different considerations apply under the new sub-rule (*d*-1) of Order 33, rule 5, to those which apply under sub-rule (*d*). Whether the allegations in an application for leave to sue as a pauper do or do not show a cause of action is a question quite different from the question whether the suit appears to be barred by limitation. Accordingly there is no bar to the hearing of evidence as to the date of birth of the applicant for deciding whether the suit was barred by limitation.

(1941) 1 M.L.J. 31, distinguished.

G. Chandrasekhara Sastri for Petitioner.

B. V. Subrahmanyam and *P. Satyanarayana Rao* for Respondent.

K.S.

Bell, J. Venkatachala Pillai *v.* Rajagopal Naidu.

20th April, 1945. C. R. P. No. 1573 of 1944.

Transfer of Property Act (IV of 1882), section 100—Charge brought into being by a decree of Court—If one brought into existence by "operation of law."

Under section 100 of the Transfer of Property Act, a charge must be brought into existence either by act of parties or by operation of law. The words "by operation of law" do include a charge brought into being by a decree of a competent Court.

A.I.R. 1943 Oudh 354 (F.B.) and A.I.R. 1943 Bom. 414, followed. I.L.R. (1941) Nag. 513; A.I.R. 1940 Nag. 163, dissented from.

N. Panchapagesa Aiyar for Petitioner.

L. V. Krishnaswami Aiyar for Respondent.

K.S.

Somayya, J. Valliammal Ammal *v.* Ramaswami Naidu.

20th April, 1945. S. A. No. 1616 of 1944.

Succession certificate—Grant of—Effect—Entitles holder only to sue for a debt and not to assign the debt.

The grant of a succession certificate only clothes the grantee with a right to sue for a debt due to the deceased and that right cannot be transferred. The holder of the certificate has no right to assign a mortgage debt or effect a sub-mortgage of it.

[I.L.R. 35 All. 74 and I.L.R. 36 All. 21, relied on. Observations in (1943) 2 M.L.J. 201 held to be *obiter* and not followed.] Leave to appeal granted.

T. S. Vaidyanatha Aiyar for Appellant.

K. V. Srinivasa Aiyar and *N. C. Raghavachari* for Respondents.

K.S.

Kuppuswami Ayyar, J. Linga, *In re.*

27th April, 1945. Crl. R. C. No. 169 of 1945.

Criminal Trial—Rioting and causing hurt during the course of rioting—Separate sentences—Legality—Sentences if can run consecutively.

Where the accused persons have been convicted for rioting and also for causing hurt during the course of the rioting there is no bar to the passing of separate sentences in respect of each of those offences. But as it is only the fact that injury was caused that constituted rioting and since the same set of facts constituted both offences it is but proper that the sentences should be directed to run concurrently and not consecutively.

V. T. Rangaswami Aiyangar and *N. C. Raghavachari* for first Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Clarke, J. S. S. Vasan, *In re.*

26th June, 1945. Crl. R. C. No. 356 of 1945.
(Crl. R. P. No. 332 of 1945).

Newsprint Control Order (1941), *clause* 3 (6) *and Defence of India Rules* (1939), *rule* 81 (4)*—Use of paper other than newsprint for production of annual supplement to a weekly—How far an offence.*

The proprietor and editor of a weekly was prosecuted for an offence under rule 81 (4) of the Defence of India Rules read with clause 3 (6) of the Newsprint Control Order, 1941, for using paper other than newsprint for the production of an annual supplement issued at Deepavali in the year 1944.

Sub-clause (6) of section 3 of the Newsprint Control Order prohibits the proprietor of a newspaper from using in the printing of his "newspaper" any kind of paper other than newsprint. It was contended for the prosecution that the explanation to sub-clause (5) which includes a supplement or annual edition in the definition of a "newspaper" was applicable to sub-clause (6) also and therefore the supplement was a "newspaper."

Held, the supplement issued on the occasion of an annual festival whilst it may well have contained comments on the news for the past year cannot ordinarily be regarded as a newspaper on that account. Nor does the supplement fall within the definition of a "newspaper" in the Newspaper Control Order, 1944, as it was not a "periodical publication printed on newsprint." In the absence of an explanation to sub-clause (6) of clause 3 of the Newsprint Control Order similar to the explanation to sub-clause (5) the supplement cannot be regarded as a "newspaper" so as to make the use of paper other than newsprint in producing it an offence.

V. C. Gopalaratnam and *B. T. Sundararajan* for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Chandrasekhara Ayyar, J. Mohammed Hussain *v.* Official Receiver, West Godavari.
9th July, 1945. C. R. P. No. 733 of 1944.

Provincial Insolvency Act (V of 1920), section 4—Scope—Complicated questions of title—Jurisdiction to go into.

Although the Insolvency Court can decline to adjudicate on questions of title or property under section 4 of the Provincial Insolvency Act on the ground of their being complicated there is nothing to prevent the Court from deciding applications under section 4.

K. Mangachari for Petitioner.

E. Venkatesan for Respondent.

K.S.

Happell, J. Public Prosecutor, Madras *v.* Venkatanarayana.
10th July, 1945. Crl. App. No. 143 of 1945.

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943), section 6 (2) (b) (ii)—Construction—Sale price with 20 per cent. over cost price—Freight charges cannot be included.

For the purpose of calculating whether the price at which a dealer accused under the Hoarding and Profiteering Prevention Ordinance had sold articles was within the 20 per cent. addition to the price at which the producer had sold the article to him, it is not open to him to add to the price at which the producer sold the article the expenses incurred by him such as freight, forwarding charges and so forth. The cost of the article to the dealer is not the governing factor.

The Public Prosecutor (*V. L. Ethiraj*) Appellant.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

K.S.

Chandrasekhara Ayyar, J. Mahabub Sahib *v.* Sisidheswaraswami Temple.
10th July, 1945. S. A. No. 394 of 1943.

Public way—Newly erected mosque on it—Agreement at time of erecting mosque by all the then Muhammadan residents of the village not to object to processions by Hindus with music opposite the mosque—Muhammadan community how far bound—Penal Code (XLV of 1860), section 296—Gist of offence under.

A new mosque had come into existence somewhere about 1904 or 1905, and permission was given to the Muhammadans of the village, who wanted to have that mosque erected, to construct it on a particular site, despite objections raised by the Hindus, and on the undertaking given by all the then Muhammadan residents of the place that there shall be no obstruction raised by them to music being played on the High Road in connection with private or temple processions. In a suit by the Hindu residents of the village for declaration of their right to pass along the particular public road in procession to the accompaniment of music, it was contended that the undertaking was not binding against the Muhammadan community and that it was not open to a few Muhammadans however influential, or even to all the Muhammadan residents of a particular place or locality to enter into an agreement of that kind.

Held, that the agreement was binding on the Muhammadan community.

Mere playing music before a mosque cannot amount to an offence under section 296 of the Penal Code though a deliberate intention to disturb may not be necessary. Before that section could apply it must be found as a fact that there was a substantial and not merely fanciful disturbance of the worship. Accordingly the Hindus' right cannot be declared subject to a condition requiring them to stop playing in the processions musical accompaniments within the limits of one chain on either side of the mosque compound at the five times of the public congregational prayers in the mosque.

(1938) 2 M.L.J. 165, distinguished.

B. Pocker and *A. M. Allapichai* for Appellants.

A. Bhujanga Rao, R. Krishna Sastri and *D. R. Krishna Rao* for Respondents.

K.S.

Mockett and Bell, JJ. Chinna Obigadu, *In re.*
18th July, 1945. R. T. No. 88 of 1945.

Criminal Procedure Code (V of 1898), S. 102—Constable searching house after pursuing into it a person who had just committed a murder—If bound to search himself and persons going into the house with him.

A person who had just committed a murder had run into his house and bolted himself in. There was an outcry and various people including a constable gathered. The crowd closed the house to prevent the accused from coming out but when he was challenged by the constable he did come out. In the house were found blood-stained clothes and a blood-stained dagger.

N.R.C.

In cross-examination the constable said that he did not observe the provisions as to house-searches and did not search himself or the panchayatdars before going into the house to search,

Held, section 102 of the Criminal Procedure Code relates only to formal searches under search warrants issued under sections 96 or 98. In an emergency such as the one in the case when the police are not going in for the purpose of a search for any specified object but for a general investigation there is no provision of the Criminal Procedure Code which imposes on them the duty of searching respectable citizens or themselves before the public. Whether as a matter of convention these things may be done in order to remove any cause for subsequent criticism is another matter.

G. Gopalaswami for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Ramakrishna Doss, *In re.*
19th July, 1945. Crl. R. C. No. 139 of 1945.
(Crl. R. P. No. 133 of 1945).

Defence of India Rules (1939)—*Notification under issued on 20th April,* 1943, *prohibiting transport of chillies from any place in the Madras Province to any place outside the province without permit—Transport from enclave villages of Travancore State to Travancore proper through Madras territory—If transport from Madras—Road through Madras territory maintained by Travancore State—If Madras territory.*

The Madras notification issued on 20th April, 1943, under the powers conferred by the Central Government under the Defence of India Rules prohibited the transport of chillies from any place in the Province of Madras to any place in India outside the province except under and in accordance with the terms and conditions of a permit.

In a prosecution in respect of an attempt to transport chillies without permit from the Travancore enclave villages (villages entirely surrounded by British territory and cut off from the Travancore State) to the Travancore State,

Held, that if goods are taken through the Province of Madras to a place outside the Province even though they originated elsewhere, they are taken from a place in Madras to a place outside the Province within the meaning of the notification. Once the prohibited goods have entered the Province of Madras, they cannot be taken out without a permit. It cannot be said that in effect the transport of chillies will be from one part of Travancore State to another since the road between the enclave villages and Travancore territory over which the chillies were transported is maintained by the Travancore Government. The road none-the-less is Madras territory and consequently the chillies were transported from a place in Madras to a place in Travancore territory so as to attract the notification.

Roland Braddell and *K. V. Ramaseshan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Haridayal, *In re.*
27th July, 1945. Cr. A. No. 76 of 1945.

Hoarding and Profiteering Prevention Ordinance—(*XXXV of* 1943), *section* 6 (1)—*Prosecution of retail dealer for offence under—Cost of production of the article concerned—Failure of prosecution to prove—Effect—Absence of any objection at the trial on that ground and basis favourable to accused at cost to him adopted—Conviction if to be interfered with on appeal.*

It cannot be said that a prosecution under section 6 (1) of the Hoarding and Profiteering Prevention Ordinance must fail unless the cost of production of the article concerned is proved.

Jebb v. *Emperor,* unreported decision of the Calcutta High Court distinguished.

Where at the trial on a charge under the Hoarding and Profiteering Prevention Ordinance of selling an article for a consideration which was unreasonable no objection was taken to the basis for calculation adopted for testing the price, namely, the cost to the retailer which was certainly above the cost of production, that basis being *prima facie* more favourable to the accused, there is no sufficient justification for interfering with the conviction of the accused on appeal.

V. L. Ethiraj (The Public Prosecutor) and *A. S. Sivakaminathan* (The Assistant Public Prosecutor) for the Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Shahab-ud-din, J. Sankaran Nambiar *v.* Kottayam Bank.
13*th July*, 1945. C. R. P. No. 317 of 1945.

Companies Act (VII of 1913), *section* 235—*Proceedings under against directors—Death of one of them during the enquiry—Proceedings cannot be continued against his heirs.*

Where during the enquiry of proceedings commenced under section 235 of the Companies Act against the directors of a company one of the directors died, the application cannot be continued against his heirs as representing his estate. I.L.R. (1939) All. 6 and I.L.R. (1944) Bom. 84, relied on. Section 198 of the Companies Act only deals with the powers of the Court with regard to the estate of a contributory or a debtor and that power cannot be exercised in summary proceedings under section 235. Order 22, rule 4 of the Code of Civil Procedure applies only where the right to sue survives and is not applicable to proceedings under section 235 of the Companies Act, the right to continue which does not survive the death of a respondent.

S. Venkatachala Sastri for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Chandrasekhara Aiyar, J. Paparao *v.* Polinaidu.
18th *July*, 1945. S. A. No. 1423 of 1943.

Sale of land—Express covenant for title and for freedom from encumbrances—Is a term of contract—Oral evidence to show that purchase was subject to any encumbrance—Not admissible—Evidence Act (I of 1872) *section* 92—*Damages for breach of covenant—Measure of.*

An express covenant for title or for freedom from encumbrance in a sale of land, cannot be regarded as a mere recital which can be contradicted by oral evidence. Such covenants are terms of the contract itself, and any oral evidence to contradict them falls within the mischief of section 92 of the Evidence Act. A.I.R. 1925 Mad. 968, dissented from.

The measure of damages which the vendee is entitled to is only the amount by which the existence of the encumbrance can be said to have diminished the value of the property and not the value of the land unless there has been any eviction of the purchaser from the land itself.

V. Govindarajachari and *E. Venkatesam* for Appellants.

V. Parthasarathy for Respondent.

K.S.

Chandrasekhara Aiyar, J. Pitchamma *v.* Rosamma.
26*th July*, 1945. S. A. No. 1409 of 1944.

Practice—First appeal—Confirming judgment—Proper form.

A confirming judgment may be brief, but it cannot be a blank. It is the obligation of the appellate Judge to deal with the various arguments urged by the appellant against the conclusion of the trial Court and to give his reasons for repelling those arguments if he was of the opinion that they should be so rejected. Merely to say that the Munsiff's view is sound on the evidence is not to give any indication that the appellate Judge has applied his own mind to the questions at issue between the parties.

K. Umamaheswaram and *P. R. Ramachandra Rao* for Appellant.

B. V. Ramanarasu and *N. Kotiswara Rao* for Respondent.

K.S.

Kuppuswami Ayyar, J. Bhupathiraju Ramaraju, *In re.*
26th *July*, 1945. Crl. R. C. No. 408 of 1945.
(Case Refd. No. 6 of 1945).

Evidence Act (I of 1872), *section* 114—*Possession of stolen property by a born deaf and dumb person—Impossibility of making him understand what he was asked and absence of any attempt to find if he could give an explanation—Inference under section* 114 *Evidence Act, as to theft by him cannot be drawn.*

An inference under section 114 of the Evidence Act that a person in possession of stolen property shortly thereafter committed the offence of housebreaking or theft could be drawn only if he is not able to explain his possession of such property. Where however it is not possible to communicate with such person because he was born deaf and dumb and no attempt was made to make him explain the possession, the inference cannot be drawn. It is only if an explanation is called for and he fails to give a satisfactory one, such a presumption could be drawn.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Rajamannar, J. Poliah *v.* Muniswami Chetty.
27*th July*, 1945. C. R. P. No. 1222 of 1944.

Madras Debt Conciliation Act (XI of 1936), *section* 10 (3)—"*Civil Court*" *before which creditor whose debt has been declared discharged under section* 10 (1) *may file application for revival of his debt—Should be one having pecuniary as well as territorial jurisdiction as regards the debt sought to be revived.*

N R C

The "Civil Court" contemplated in sub-section (3) of section 10 of the Madras Debt Conciliation Act before which a creditor may file an application for revival of his debt (which had been declared discharged under sub-section (1) of that section) is the Civil Court which would be competent to entertain a suit for the recovery of the debt sought to be recovered. Consequently a District Munsiff would not be competent to entertain an application for revival of a debt amounting to more than Rs. 3,000 on the date of the application to the Debt Conciliation Board. The Court should be possessed of not only territorial but also of pecuniary jurisdiction.

K. Umamaheswaram for Petitioner.

K. Krishnamurthi for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Foulkes *v.* Salem Municipal Council.

30th July, 1945. — S. A. No. 1632 of 1944.

Madras District Municipalities Act (V of 1920), section 81 (4) *(b)—Assessment to property tax—Person owning only "melwaram" rights in agricultural land—Liability of.*

Under section 81 (4) of the Madras District Municipalities Act, a person owning property is liable to assessment of property tax and it is not necessary that he should own the entire interest in agricultural land. Accordingly a person having only the melwaram right cannot escape assessment on the ground that the lands are in the possession of occupancy ryots.

M. Sundaram for Appellant.

K. Subba Rao for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Ranganayaki Ammal *v.* Chellammal.

31st July, 1945. — S. A. No. 1733 of 1944.

Limitation Act (IX of 1908), Article 61—Next friend of lunatic incurring expenses in suing for reducing the lunatic's estate to possession—Wife of lunatic appointed manager of his estate—Subsequent removal of next friend and substitution of the wife and another as next friend—Claim for recovery of expenses incurred in the suit by first next friend—Limitation—Starting point.

The sister of a lunatic filed a suit as his next friend to recover certain properties in the hands of third parties. The preliminary decree was passed on 5th December, 1931, and it was confirmed on appeal on 1st October, 1937. The final decree was made on 1st November, 1940. Meantime the lunatic's wife successfully applied to be appointed the manager of the lunatic's estate. The order appointing the wife as manager was made on 19th April, 1934, and confirmed on appeal on 22nd July, 1937. Thereupon, the wife applied on 10th December, 1937, for removal of the sister from her place as next friend of the lunatic and for the substitution of herself and another person in her place. The order allowing the application was made on 25th November, 1938. The sister then filed a suit on 19th November, 1941 to recover moneys that she spent in the suit filed by her as next friend and connected proceedings:

Held, the suit was within limitation having been brought within three years from the order removing the plaintiff from her place as next friend. The appointment of the wife as manager did not by itself operate as a removal of the sister from her position as next friend. There must be an actual removal ordered by the Court before a next friend can terminate his or her connection with the suit and the cause of action for recovering the moneys spent in that suit by the next friend arises only on her removal.

B. Manavala Chowdari and *T. K. Subramania Pillai* for Appellant.

C. Narasimhachari and *M. E. Rajagopalachari* for Respondent.

K.S.

Kuppuswami Ayyar, J. — Labhar *alias* Sheck Abdul Khadir, *In re.*

3rd August, 1945. — Cr. R. C. No. 434 of 1945.

(Crl. R. P. No. 398 of 1945).

Criminal Procedure Code (V of 1898), section 196-A*—Conspiracy to export gold from British India in contravention of rule* 90-B *of the Defence of India Rules—Prosecution for—Does not require sanction under section* 196-A, *Criminal Procedure Code.*

A conspiracy to export gold from British India in contravention of rule 90-B of the Defence of India Rules is one to commit a cognizable offence in respect of which the offender is liable to receive a sentence of 5 years rigorous imprisonment. Consequently section 196-A, Criminal Procedure Code does not necessitate a previous sanction.

The substitution in March, 1941, of the present sub-rule 3 to rule 90-B of the Defence of India Rules merely enabled those who contravened the rule the benefit of being dealt with under the Sea Customs Act, 1878. But at the same time the Amendment retained the punishment for such offences in cases where the Collector thought that the benefits of the Sea Customs Act ought not to be given to a particular offender or a particular offence ; and in that case the punishment of 5 years rigorous imprisonment was retained.

V. V. Srinivasa Aiyangar, K. Bashyam, T. R. Srinivasan and *R. Desikan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

BHAGWAT SHUKUL *v.* MT. KAPORNI, (1944) I.L.R. 23 Pat. 599 (F.B.).

This case holds that self-acquired property given by a Mitakshara father to his son will be ancestral property in the hands of the latter unless the donor has manifested a different intention. In reaching that conclusion the Full Bench has followed the ruling in *Nagalinga* v. *Ramachandra*[1]. The decisions of the different High Courts are reviewed in detail. The learned Judges also refer to certain observations of the Privy Council in *Ulagalum Perumal Sethurayar* v. *Subbulakshmi Nachiar*[2], as affording support to their conclusion. In that case an impartible estate had been conveyed by the holder under a settlement to a younger son, on whose death a dispute as to succession arose between the widow of the donee and a half-brother. The latter claimed the estate by survivorship. In the course of its judgment the Privy Council observed: "The High Court was careful to point out that the present case raises no questions such as might have arisen had Minakshisundara (the donee) died leaving sons—whether the estate in his hands was ancestral as having come to him from his father in the sense that a son would have taken an interest therein at his birth. On this subject there has been much divergence of opinion in India, and it was left unsettled by the judgment of the Board in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh*[3]". Upholding the widow's claim on the ground that at any rate as against his collaterals the donee took the property as separate property, the Privy Council concluded: "They say nothing here as to family arrangement or the power of a grantor to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in *Sartaj Kuari's case*[4], according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognise, however, that as between the grantee and his sons questions may arise upon which these considerations or some of them, may have importance". The claim that the latter part of these observations indicate in a measure their Lordships' inclination to hold that self-acquired property gifted by a father to his son would be ancestral in the hands of the latter is somewhat debatable. Anyway the point raised in (1945) 1 M.L.J. (N.I.C.) at pages 10 to 12 that the effect of the provisions of section 8 of the Transfer of Property Act in regard to the construction of such gifts has not been noticed in the decisions on the matter so far, still remains valid and it will be a question for consideration whether the principle laid down in *Nagalinga's case*[1] would be consistent with the provisions of section 8 of the Transfer of Property Act.

WAMANLAL CHHOTALAL *v.* THE SCINDIA STEAM NAVIGATION CO., LTD., I.L.R. (1944) Bom. 247.

The judgment in this case contains an interesting and elaborate discussion of the question whether the purchase of bullion can constitute an "investment." The facts were that in May 1940, at a time when the political and war situation was particularly grave the directors of the respondent company resolved purely out of considerations of safety to invest a substantial amount in the purchase of bullion and to keep the same in safe custody in a bank. The plaintiff-appellant, who was a shareholder in the said company sued for a declaration that the said transaction was *ultra vires.* It appeared that the objects clause in the Memorandum of Association of the company permitted the company among other things "to invest money of the company in such manner (other than in the shares of this company) as the directors think fit." On this Mr. Justice Kania held, agreeing with the trial Judge Mr. Justice Chagla, that the purchase constituted an investment, while the Chief Justice took a contrary view. The discussion turned

1. (1901) 11 M.L.J. 210: I.L.R. 24 Mad. 429.
2. (1939) 1 M.L.J. 812: L.R. 66 I.A. 134: I.L.R. (1939) Mad. 443 (P.C.).
3. (1923) 47 M.L.J. 260: L.R. 50 I.A. 265: I.L.R. 45 All. 596 (P.C.).
4. (1887) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

on the meaning of the word "invest." On behalf of the plaintiff it was contended that the idea of investment must carry with it the capacity to produce interest, profit or dividend and in that connection the observations of Lawrence, J., in In re *Wragg*: *Wragg* v. *Palmer*[1] and the definition of the word in Murray's Oxford Dictionary were relied on. As against this is the general meaning of the word given in Wharton's Law Lexicon, namely, "to lay out money." The discussion in the judgments as regards the question whether the deposit with a Banker constitutes an investment is really irrelevant for a rendering of the decision on the point raised.

It is submitted that that the view of Kania, J., has greater reason to commend itself for acceptance. It is well to remember in this connection the observations of Lord Simon in *Perrin* v. *Morgan*[2] that "it is a mistake to pick out one interpretation of the word and to call it the "legal" meaning or the "strict legal" meaning as if it had some superior right to prevail over another equally usual and not illegitimate meaning." The word "invest" is undoubtedly used in common parlance with reference to acquisition of land or jewellery. Suppose money is laid out in the purchase of a building site which does not yield any return, can it be said that it is not an investment? The element of profit in such a case must necessarily be problematical. Take again a purchase of non-income yielding but redeemable Government Promissory Notes. Such an issue has been made in India and subscribed to by Princes and business magnates. The paramount idea in such a case may be to support the Government at a time of crisis, but it will none the less be difficult to deny that the lock-up is an investment. The motive with which the money was laid out in such cases will be hardly material; and so the fact that the respondent company purchased the bullion purely out of considerations of safety and not with a view to profit is beside the point. In such a case there is always the possibility of making a profit and the purchase of bullion should therefore be taken to be an investment even if looked at from that narrow point. Although the Judges in the above case differed as to the scope of the word "invest" they agreed in holding that the purchase was in any event an acquisition of "personal estate or effects" within the meaning of another clause in the memorandum of articles and was consequently not *ultra vires* of the directors, and the result was that the decision of the trial Court was upheld on this new point.

JANAKIRAM COMPANY *v.* CHUNILAL SHRIRAM, I.L.R. (1944) Bom. 675.

In this case effect was given to the well-settled rule that an application for review cannot be maintained after an appeal is preferred from the decree. It was held that when a party presents an application for review of judgment after he has filed an appeal from the same, the review application is incompetent even though the Court merely rejects the appeal as beyond time. Reliance was placed on the earlier decision of that Court in *Balling* v. *Devasthan Fund*[3], which however is opposed to *Ram Prasad* v. *Asa Ram*[4]. If in the given case the appeal was incompetent, it can well be said that the appeal was *non est* and that consequently the review application could be proceeded with. As regards the question whether the review application can be proceeded with after the appeal previously filed is withdrawn there is conflict of authority. (Cf. *Gulabkhan* v. *Muniruddin*[5] and *Thakur Singh* v. *Dinanath Sah*[6].) The language of the rule "from which no appeal has been *preferred*" would seem to point to the conclusion that the withdrawal is immaterial and that once the appeal is preferred it bars any application for review. The question has again arisen as to what should happen where an appeal is preferred after an application for review is presented. In such cases the Madras and Calcutta High Courts had little difficulty in holding that the review application could be heard notwithstanding the preferring of the appeal subsequently. (Cf. *Chenna Reddi* v. *Pedda Obi Reddi*[7] and *Rayfield* v. *Raj Narain*[8].)

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1. (1919) 2 Ch. 58.
2. (1943) A.C. 399.
3. (1930) 33 Bom.L.R. 378.
4. (1920) I.L.R. 43 All. 288.
5. (1935) 31 N.L.R. 418.
6. A.I.R. 1937 Pat 528.
7. (1909) 19 M.L.J. 388 : I.L.R. 32 Mad. 416 (F.B.).
8. (1936) 41 C.W.N. 129.

PRASAD CHANDRA BANERJI *v.* EMPEROR, I.L.R. (1944) 1 Cal. 113.

Does the protection given by section 197, Criminal Procedure Code, apply to a person who has ceased to be a public servant at the time the prosecution is launched? It is astonishing that this question which ought to have been perfectly well-settled by decisions is still open to doubt to-day. The authorities are conflicting: The Nagpur and Sindh Courts have held that the protection afforded by the section will apply to a person who was a public servant when the offence was committed, even though he was removed from office when the prosecution was launched. (Cf. *Suganchand* v. *Naraindas*[1]; In re *S. Y. Patil*[2].) "The protection would be largely illusory," observed Pollock, J., in the latter case "if it were open to people to wait until the public servant has ceased to hold that position and then lodge their complaint, for generally there is no question of limitation in criminal proceedings. A public servant who is on the verge of retirement would have no protection whatever." The decision of the Calcutta High Court in the above case dissents from these decisions and holds that the protection does not extend to a person who has ceased to hold office when he was prosecuted. The same view was taken by the Allahabad High Court in *Suraj Narain* v. *Emperor*[3], although strangely enough a reference is not made to this decision in the case on hand. It is difficult to say that the latter view is unsound. The language of the section, namely, "where any public servant . . . . . *is accused* of an offence . . . . ." is clearly in favour of such a position. On the other hand, it is undoubtedly harsh that the section, which obviously is based on high policy, should be circumvented in a given case by the removal of the public servant and the prosecution being launched almost immediately thereafter. But that and other similar reasons may be a good ground for legislative amendment but will not justify a forced interpretation of the language of the clause. It is hoped that the section will be suitably modified so as to place the matter beyond doubt. There is no reason why it should not be liberally amended in order to confer the protection on a public servant who has ceased to hold office at the time the prosecution is launched.

In re EAST BENGAL SUGAR MILLS, LTD., I.L.R. (1944) 1 Cal. 118.

A short but interesting point under the Registration Act was decided in this case. It was held that a debenture charged on the entire property of a company including immoveable property must be registered under section 17 of the Registration Act in addition to its registration under section 109 of the Companies Act. It was further pointed out that it was immaterial for this point that there was a floating and not a fixed charge. The practical difficulties of holding the contrary view are forcibly pointed out by the Chief Justice. The object of the Registration Act, namely, to protect the local man, will undoubtedly be nullified if the registration at another place will be sufficient. The compulsory registration under the Registration Act is all the more necessary now because the rule laid down in *Tilakdhari Lal* v. *Khedan Lal*[4] has been modified by the Transfer of Property Amendment Act of 1929, and it has been provided in Explanation I of section 3 of that Act that registration amounts to notice as from the date of registration. The necessity for registration is also supported by the practice adopted under section 30 (2) of the Registration Act in the case of an instrument relating to properties scattered in different registration sub-districts.

MER DIN *v.* KULTILAK RAM, (1943) I.L.R. 25 Lah. 24 (F.B.).

Two questions relating to court-fees arose for decision in this case. The first question was whether when in a suit founded upon two mortgages a lump sum decree has been given in the trial Court without any apportionment of the amount between the two mortgages there should be considered to be one or two "distinct subjects" of the appeal within the meaning of section 17 of the Court-Fees Act.

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1. A.I.R. 1932 Sind 177.
2. A.I.R. 1937 Nag. 293.
3. I.L.R. (1938) All. 776.
4. (1920) 39 M.L.J. 243 : L.R. 47 I.A. 239 : I.L.R. 48 Cal. 1 (P.C.).

The second point was as to the court-fee payable in a case where the subject-matter of the appeal was future interest running to an uncertain date.

The two mortgages were executed as between the same parties charging the same property for the unpaid purchase money. It was held by the Full Bench that court-fee was payable on the aggregate amount and not on the two mortgage amounts treating them as distinct subjects. It is somewhat difficult to follow the reasoning on the point. One of the reasons for the view adopted was that the second mortgage bond merely corrected an error in the first and that it really consolidated the two mortgage debts into one. There was really no error in the first mortgage deed, only on account of the fact that the vendee was not in possession of sufficient funds as contemplated originally he had to execute another deed. It is indeed strange that the motive of the parties and the circumstances attendant on the transaction should be scrutinised for determining the court-fee payable. If the mortgages were in fact entered into separately it is difficult to say that they constitute a single item. It is not analogous to the case where several promissory notes are executed as between the same parties in pursuance of a single contract of loan. On the other hand it resembles cases where separate hundis or promissory notes are executed between the same parties on the same day. In those cases it has been held that the suit embraces distinct subjects. (See *Parshotam Lal* v. *Lachman Das*[1]. See also *Secretary of State* v. *Ayyaswami Chettiar*[2] and *Muthusami Chettiar* v. *Krishna Aiyar*[3].) The fact that the plaintiff or the trial Court treated the claim as one for a consolidated sum will hardly be material. The test in such cases will be whether the mortgagee had separate causes of action or right to obtain relief in respect of the mortgages. It is somewhat strange that the Full Bench did not choose to refer to the direct cases of the other High Courts holding the contrary view. (See *Muthusami Chettiar* v. *Krishna Aiyar*[3], *Radharanee Dassya* v. *Kshetra Mohan*[4] and *R. M. P. L. S. Chettyar Firm* v. *Koormiah*[5].) In those cases, it was pointed out that the question was complicated by reason of the amendment introduced by section 67-A of the Transfer of Property Act, which provides that the mortgagee is bound to sue on all the mortgages executed in his favour by the mortgagor. But, as pointed out in those decisions it is one thing to say that a single suit should be instituted in such cases and it is another thing altogether that the mortgages should be treated as one subject for purposes of court-fees. No doubt in view of the present section 67-A of the Transfer of Property Act the legislature may well take on hand an amendment of section 17 of the Court-Fees Act so as to define exactly what the term " distinct subjects " means and provide therein that in the case of several mortgages or promissory notes between the same parties the suit may be deemed to comprise a single subject. In the absence of such a provision the reasoning in the above case seems somewhat unconvincing.

On the second point as to the court-fee payable on claims for future interest the period for which the claim was made is divisible into parts: the period from the date of the institution of the suit to the date of redemption, and the period from the date of redemption, to the date of realisation. As regards the first portion of the claim the amount is undoubtedly ascertainable by reference to the decree and the possibility of the mortgagee redeeming the mortgage at an earlier date was rightly held to be irrelevant for computing the court-fee, the principle being that the party seeks to get rid of his liability for an ascertained sum as provided in the decree. In respect of future interest however from the date fixed for redemption to the date of realisation the Court again rightly held that as the amount is not capable of ascertainment court-fee is payable under Article 17 (*vi*) of Schedule II of the Court-Fees Act and reliance was placed on *Bhawani Prasad* v. *Kutub-un-Nissa*[6]. It will be illogical in such a case to hold that the appellant should pay court-fee on the estimated interest amount from the date fixed in the decree down to the date of the presentation of the memorandum of appeal.

1. (1887) I.L.R. 9 All. 252.
2. (1932) 65 M.L.J. 252.
3. (1934) 68 M.L.J. 316.
4. (1936) 40 C.W.N. 406.
5. (1940) Rang. L.R. 767.
6. (1905) I.L.R. 27 All. 559.

SUBRAMANIAN *v.* MUTHIAH CHETTIAR, I.L.R. (1945) Mad. 638.

Tempora mutantur. From the days when it was the law that no adoption can be made if its effect would be to divest an estate vested in a person other than the adopting widow, the pendulum has swung to the other end and the present view is that an adoption validly made,—the test being spiritual efficacy or benefit only,—cannot be denied effect and that estates vested in third persons, whether by survivorship, inheritance or reverter, may be divested. Thus in *Anant* v. *Shankar*[1], the Privy Council recognised that where the adoption is by the widow of a pre-deceased collateral of the last surviving coparcener the death of the latter before the adoption is no ground for denying that the interest of the adoptive father or any part of it passes to the adopted son ; that an exercise of the power of adoption by the mother of the last surviving coparcener cannot be given less effect than would have attached to an adoption in such circumstances by the widow of a pre-deceased collateral ; and, the fact that the property had vested in the meantime in the heir of the last coparcener is not of itself a reason why it should not divest and pass to the adopted son. In that very case, the Privy Council expressly reserved the question as to the effect of the adoption on the adopted son's right to come in as the heir of a collateral who had died before his adoption. In the case under review, however, it is held, though *obiter*, that the adopted son of a widower can on adoption divest the properties of the predeceased wife of the adopter from the person to whom it had passed as heir on her death. The learned Judges point out that " the matter is not covered by judicial decision." Though in a strict sense this is true, there is some authority as to the principle that would govern such a case. In the case in question, one Deivanai died on 28th August, 1938, and her husband made an adoption on 7th June, 1939.

Adoption enim naturam imitatur. The adopted son is the " reflection " of an aurasa son. These are striking and picturesque metaphors, neat and logical. Analogy is however far short of complete identity and incoherence of facts often modify the results of pure logic. Is there then any justification to push the fiction to its logical limits? In permitting the right of adoption to be exercised by a bachelor, in recognising an adoption made by a girl, while still in her teens, of a boy designated by her husband, in refraining from imposing any limit as to the margin of age which should separate the adopter from the adoptee and in various other directions law has not given effect to the principle that adoption imitates nature.

In *Padma Kumari Chowdhrani* v. *Court of Wards*[2], it was stated : " an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the Dattaka Chandrika and Dattaka Mimamsa". The principle was reaffirmed in *Pratapsingh Shivsingh* v. *Agarsangji Rajasangji*[3], where the Privy Council observed : " It is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son." It would therefore be idle to deny that the adopted son's rights are not co-terminous ordinarily with those of an aurasa son. The questions will still remain as to the exact point of time from which those rights are to be computed and whether the rule is to be confined in its operation only to the estate of the adoptive father, interpreting that term in a somewhat liberal sense, or whether it is to operate even with reference to the estates of collaterals. As to this point, in *Anant* v. *Shankar*[1], Sir George Rankin observed that after the decision in *Amarendra* v. *Sanatan Singh*[4], the view taken in *Faizuddin Ali Khan* v. *Tincowri Saha*[5], that *Bhoobunmoyee's case*[6], involved that no adopted son could claim as preferential heir the estate of any person other than his adoptive father if such

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1. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. (1944) Bom. 116 (P.C.).
2. (1881) L.R. 8 I.A. 229 : I.L.R. 8 Cal. 302, 311 (P.C.).
3. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
4. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
5. (1895) I.L.R. 22 Cal. 565, 571.
6. (1865) 10 Moo. I.A. 307 (P.C.).

estate had vested before the adoption in some heir other than the adoptive widow, as well as the view of Telang, J., in *Chandra* v. *Gojrabai*[1] that *Bhoobunmoyee's case*[2] involved that adoption by a widow does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband, are no longer tenable. This does not, however, amount to holding that even the estate of a collateral of the father which prior to the adoption had devolved on the heirs of such collateral on his death can be recalled. Such a contention stands negatived by the observations of the Privy Council in *Bhubaneswari Debi* v. *Nilkomul Lahiri*[3]. In that case there were three brothers Kalimohun, Rammohun and Shibnath. Kalimohun died leaving his son Nilkomul. Rammohun died sonless leaving his wife Chandmoni as heir to his eatate. Shibnath who had survived his brothers died in 1861, empowering his wife Bhubaneswari to adopt. Chandmoni died in 1867 and at the time of her death the nearest reversioner was Nilkomul who accordingly took his uncle's estate as his heir. Bhubaneswari made an adoption in 1879. The adopted son sued for the recovery of a half share of the estate of Rammohun from Nilkomul claiming that his adoption related back to the death of his own father and as such he should be held entitled to share the inheritance that fell open on Chandmoni's death which admittedly was later. It was further claimed that in any event Nilkomul having fraudulently prevented Bhubaneswari from adopting a son till the death of Chandmoni he would be estopped from questioning the claim of the adopted son to a half share of the estate of Rammohun. It was in evidence that the adopted son was born only in 1870 or 1871, that is to say, long subsequent to the death of Chandmoni and the opening of inheritance to Rammohun. In rejecting the claim of the adopted son, Sir Barnes Peacock observed: "If the widow of Shibnath had adopted a son during the lifetime of Chandmoni, that son would have been entitled to a half share of the estate of Rammohun as one of the reversionary heirs of equal degree with Nilkomul, who was also a nephew. But the allegation is, that in consequence of Nilkomul's fraud . . . . . . the widow of Shibnath was unable to get anyone to give her a son in adoption, and could not adopt until after the death of Chandmoni . . . . . . After the death of Chandmoni she did adopt the present plaintiff; but it appears clearly upon the evidence that the plaintiff was not in existence at the time of the death of Chandmoni. The widow never could, by adoption, if there had been no fraud, have made the present plaintiff a reversionary heir of half the estate of Rammohun, because he was not in existence at the time of Chandmoni's death. According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as an heir of the collateral." It is obvious that if the boy never could in the course of nature have become the heir of Rammohun's estate due to his being unborn or unconceived at the time of Rammohun's death, he could not as the result of adoption improve his position. The case could have been disposed of on that short ground. It, therefore, follows that the last part of Sir Barnes Peacock's observations cited *supra* is open to the comment that it is only *obiter*. Adverting to this case, in *Anant* v. *Shankar*[4], Sir George Rankin remarked: "Neither the present case nor *Amarendra's case*[5] brings into question the rule of law considered in *Bhubaneswari Debi* v. *Nilkomul Lahiri*[3], and stated by the Board to be that 'according to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as an heir of the collateral'." It would, therefore, be safe to presume that Sir Barnes Peacock's observation though *obiter* is yet sound law. It has been so viewed in *Chandrachoor Deo* v. *Bibhutibhushan Deva*[6]. The fact that in *Amarendra's case*[5], Amarendra was allowed to succeed *directly* to Bibhudendra, a collateral (brother), and divest the estate from Banamali who had taken it as heir to

1. (1890) I.L.R. 14 Bom. 469.
2. (1865) 10 Moo. I.A. 307 (P.C.).
3. (1885) L.R. 12 I.A. 137: I.L.R. 12 Cal. 18 (P.C.).
4. (1943) 2 M.L.J. 599: L.R. 70 I.A. 232: I.L.R. (1944) Bom. 116 (P.C.).
5. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
6. (1945) I.L.R. 23 Pat. 763.

Bibhudendra on the latter's death and before the adoption, was regarded by the learned Judges as unhelpful in view of the fact that the estate in question was, in the larger sense of the term, really that of the adoptive father and on adoption the adopted son's rights would relate back to the death of his adoptive father. That this distinction is sound is borne out by the express statement in *Anant* v. *Shankar*,[1] that neither that case nor *Amarendra's case*[2] brings into question the rule in *Bhubaneswari's case*[3]. Meredith, J., one of the learned Judges who decided the case, further pointed out: "The fiction of dating back is only for the purpose of continuing the line and conferring spiritual benefit upon the father and to a lesser extent upon the family ancestors. It is not a fiction which it is either necessary or desirable to adopt for all purposes. The son becomes a son for all purposes and as such can inherit the property of collaterals no doubt. But the question of *what* he becomes is distinct from the question of *when* he becomes it." The learned Judges held that it is only for purposes of his father's estate that adoption will relate back to the death of the adoptive father but not for enabling the adopted son to come in as an heir of his father's collateral who had died before his adoption.

The case under examination stands differently on facts. The adoption here was not by a widow but by a widower. The estate concerned was neither that of the adoptive father nor that of his descendants or of collaterals. Adoption no doubt relates back to the death of the adoptive father but it had not so far been stated that it relates back to the death of the adoptive mother also. That adoption makes the boy a son is a fiction. To extend it so as to make a predeceased wife of the adopter a mother to the boy, and her ancestors his maternal ancestors, is to superimpose a further fiction on the original one and as such would attract *atidesa dhosha*. Cases have, however, held that where a widower adopts, his predeceased wife will in the absence of any further complication be regarded as the adoptive mother of the boy. In *Sundaramma* v. *Venkatasubba Ayyar*,[4] Phillips, J., observed: "Wherever possible . . . . a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption." Madhavan Nair, J., stated: "To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child". The decision only indicates that wherever *possible* the principle that adoption imitates nature may be given effect to. The view was affirmed in *Sownthara Pandian* v. *Periaveeran Thevan*[5]. Both the cases were cases of succession to persons who died *subsequent* to the adoption. An observation of Madhavan Nair, J., in *Sundaramma's case*[4] would suggest that where a son adopted by a widower claims rights *ex parte materna* the claim will be tenable only where the inheritance opens subsequent to the adoption. The learned Judge remarked: "As his adoption puts the adopted son in the place of a legitimate son as regards the rights of inheritance in the family of the adopter, he must be considered to be the heir to *any rights arising after the adoption* from his father's wife's position in the adoptive family, though she was not alive at the time of adoption." The statement hardly affords warrant for the view that the adopted son can lay claim to the property of the adoptive mother who had died *prior* to the adoption. In the case under review the learned Judges arrived at that view mainly on two grounds: (i) the principle that adoption imitates nature compels, in the case of a widower's adoption, that a retrospective effect should be given to the adoption, carrying it back to the date of the death of the wife; (ii) if adoption by a widow could give the adopted son rights as from the date of the death of the adoptive father, it must equally in the case of an adoption by a widower make the rights of the boy go back to the

1. (1943) 2 M.L.J. 599: L.R. 70 I.A. 232: I.L.R. (1944) Bom. 116 (P.C.).
2. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
3. (1885) L.R. 12 I.A. 137: I.L.R. 12 Cal. 18 (P.C.).
4. (1926) 51 M.L.J. 545: I.L.R. 49 Mad. 941.
5. (1933) 65 M.L.J. 58: I.L.R. 56 Mad. 759 (F.B.).

date of the death of the wife. The reasons are no doubt attractive but hardly conclusive. In regard to the first ground it overlooks the fact that the principle has in a number of instances not been observed (*e.g.*, in the case of a bachelor's adoption) and in fact has been applied only where no hardship is likely to be occasioned. In regard to the second reason, it may be pointed out that it does not fit in with the caution enjoined in *Subramanian Chettiar* v. *Somasundaram Chettiar*[1] that " even a fiction cannot be carried to illogical limits " ; that it does not allow for the reservation made by the Privy Council in *Anant* v. *Shankar*[2], in regard to the ruling of the Privy Council in *Bhubaneswari Debi's case*[3] ; that it does not take note of the limitation suggested by Madhavan Nair, J., that the adopted son should be considered heir to rights *arising after* the adoption from his father's wife's position in the adoptive family and that it involves the superimposition of a number of fictions one over the other. It is also not in consonance with the view expressed in *Chandrachoor Deb* v. *Bibhutibhushan Deva*[4] that adoption has retrospective effect only *quod* the estate of the adoptive father or his descendants but not in other cases.

In re MUTHU NADAR, (1945) 1 M.L.J. 180.

An interesting question in the law of punishments fell to be decided in this case which holds that the passing of a sentence of imprisonment till the rising of the Court is not *per se* invalid. In In re *Kunhi Bava*[5], Jackson, J., remarked : " When the statute lays down that for a certain offence . . . . the punishment shall be imprisonment, it means that the offender shall go to gaol and imprisonment till the rising of the Court is a clear evasion of that intention." Likewise in In re *Ramalingayya*,[6] Horwill, J., observed apropos of such a sentence that " it is not a form of punishment recognised by law and it is used to circumvent the provisions of law that require a sentence of imprisonment in gaol for a particular term." These remarks are, with respect, open to a twofold criticism. It is not correct that imprisonment necessarily involves the idea that the offender shall go to gaol ; it is equally a mistake to suggest that the statute requires imprisonment to be in gaol only. " Imprisonment " according to the *Termes de la Ley*[7] " is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or cage in the streets, or in a man's own house, as well as in the common gaol ; and in all these places, the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places whither he will, without baile or mainprise or otherwise." Coke on Littleton[8] is to a similar effect. According to it, imprisonment is the restraint of a man's liberty under the custody of another; and extends not only to a gaol but to a house, etc., for in all these cases the party so restrained is said to be a prisoner so long as he hath not his liberty to go about his business as at other times. Bouvier[9] is explicit that imprisonment may be either in a place made use of for purposes of imprisonment generally or in any locality whatever. Among the decided cases, in *Bird* v. *Jones*[10] it was stated by Coleridge, J. : " It is one part of the definition of freedom to be able to go wheresoever one pleases, but imprisonment is something more than the mere loss of this power ; it includes the notion of restraint within some limits defined by a will or power exterior to our own." This definition was followed in *P. Narasayya Pantulu* v. *Capt. R. A. C. Stuart*[11], where the Court observed : " The retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises the exterior will." If imprisonment means merely the restraint of liberty of a person and is altogether independent of any place or

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1. (1937) 1 M.L.J. 60 : I.L.R. 59 Mad. 1064.
2. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. (1944) Bom. 116 (P.C.).
3. (1885) L.R. 12 I.A. 137 : I.L.R. 12 Cal. 18 (P.C.).
4. (1945) I.L.R. 23 Pat. 763.
5. (1928) 56 M.L.J. 550.
6. (1942) 2 M.L.J. 357.
7. See also *R.* v. *Pelham*, (1846) 8 Q.B. 959 at 963.
8. P. 253.
9. 1897 Edition, Vol. I, p. 994.
10. (1845) 7 Q.B. 742 : 115 E.R. 668.
11. (1865) 2 M.H.C.R. 396.

limit of time, the question is whether there is anything in the statute law of this country making it imperative that imprisonment should only be in gaol or that it cannot be for a period co-extensive with the rising of the Court for the day. There is nothing in the scheme of the Indian Penal Code suggesting that imprisonment should be served only in gaol. Nor is there any rule that imprisonment shall under no circumstances, where awarded, be for a term less than any particular period. The sections of the Code always indicate the maximum and only a few sections prescribe the minimum sentence to be awarded. That a sentence of imprisonment may be for a day is expressly contemplated in section 510. In the absence therefore of any statutory prescription to the contrary there seems to be nothing in law to make unlawful the award of imprisonment till the rising of the Court. In fact the rules recognise the validity of such a punishment clearly. Rule 102 of the Madras Criminal Rules of Practice says : "The Government consider the awarding of short term imprisonments as undesirable and Magistrates, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead . . . ." The decision under notice is thus in full accord with the principles of English law and is not in any way counter to any provision of law in this country.

KESAR CHAND *v.* UTTAM CHAND, (1945) 2 M.L.J. 160 (P.C.).

This is yet another pronouncement of the Privy Council on the law bearing on antecedent debts, though only incidentally. A text of Brihaspati postulates the liability of the son to pay a debt contracted by his father on account of his standing surety for payment of money lent. It has all along been understood that if as the result of default by the debtor the father's liability as surety has matured into a debt the principle of pious obligation can be invoked so long as there is nothing either illegal or immoral about the transaction. A question of an altogether different character arises where a Mitakshara father binds family property by executing a surety bond in security for payment of a debt due by third parties. It has been held that in such cases the family properties will not be bound, see *Ganga Saran v. Ganeshi Lal*[1]. The case under review approves that view. In answering the question that way, Sir Madhavan Nair observed : "To make the ancestral property liable, there must in reality be a debt due by the father. In the present case the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property." Admittedly the liability of the father, if any, was incurred under the security bond itself and not independently of or truly dissociated from it. Further the liability was only prospective and not actual. There being no indebtedness of the father at the time of the creation of the charge it followed that the family property will not be bound.

EKAMBARESWARASWAMI TEMPLE *v.* PROVINCIAL GOVERNMENT OF MADRAS, (1945) 1 M.L.J. 317 ; VENKATA KOTAYYA SASTRI *v.* PROVINCE OF MADRAS, (1945) 2 M.L.J. 250.

The question of ownership of the beds and banks of channels of irrigation as conferring rights to a free supply of water for purposes of cultivation is one of unfailing interest often characterised by considerable complexity, particularly in this country, where the position of the state *vis a vis* the cultivator has been one of conflicting and shifting ideologies and there is a multiplicity of interests in land. Not often has the approach to any question been so radically revised as in the case of entire inam villages. Even after the ruling in the *Urlam case*[2] that the effect of the permanent settlement sanad was to vest in the zemindar the beds and banks of the channels with their head sluices and branch and subsidiary channels lying within

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1. I.L.R. (1939) All. 451 (F.B.). I.L.R. 40 Mad. 886 (P.C.).
2. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 :

the zemin limits and that it made no difference even if the channels were natural streams, it was suggested that inam villages may stand on a different footing, see *Secretary of State* v. *Narayana Aiyar*[1]. In *Ambalavana* v. *Secretary of State*[2] and *Narayanaswami Naidu* v. *Secretary of State*[3], it was held that where the channel is the source of irrigation not merely for the inam village but for other ayan villages also a presumption will arise that the channel was not to pass under the grant. Even in the absence of any such consideration it was suggested that as it was possible that the inamdar may not under the grant get the full ownership even where the grant was one of "land," he may not be entitled to the beds and banks of the irrigation channels flowing through the village (*Secretary of State* v. *Narayana Aiyar*[1]) though the Privy Council had in *Venkata Sastrulu* v. *Sitaramudu*[4], referred to the possession of both varams in the land as the possession of the "whole proprietary interest." On all these matters the law has undergone modification. The line of thought set out *supra* was modified in *Venkatakrishnamaraju* v. *Suryanarayanaraju*[5], where it was observed that if the grant was of the "land," it would even if "incomplete" be yet "ownership for certain purposes." Earlier, in *Yahya Ali Saheb* v. *Secretary of State*[6], it had been recognised that the Inam Settlement was as much an "engagement" within the meaning of Madras Act VII of 1865 as the Permanent Settlement. Many of these questions fell to be authoritatively considered by the Judicial Committee in *Secretary of State* v. *Varada Thirtha Swamigal*[7]. There, reference was made to the practice that in the case of grants of whole inam villages the title deed usually contained the words "besides poramboke" to indicate that all the lands were granted and no reservation was made. It was also pointed out that the failure to mention those words would not necessarily mean that there was any reservation by the grantor of the poramboke lands and therefore of the beds of channels or that all the lands were not conveyed. The *Urlam case*[8] was referred to as laying down that even if any part of the water carried by the channels was to be specially safeguarded in the interests of other government villages it would be enough to imply a reservation of water rights as distinguished from a reservation of the beds and bunds of the channels of irrigation. In the first of the decisions under notice, it was held in accordance with these principles, that that portion of the channel wholly within the limits of the inam village concerned in the case passed to the inamdars, no reservation of the channel in favour of the government being found. The other decision dealt with certain other aspects of the matter. It is there pointed out that in the case of entire village grants the presumption is that that part of the channel which flows through the village was included in the grant; that the burden of proving the contrary lies on government; that if the government sets up that a particular channel by reason of certain special circumstances was reserved, it is for the government to prove the fact; and, the fact that the channel serves government villages lower down cannot *per se* imply any reservation by government of its bed and banks, nor the fact that the course of the channel within the village bore but a small proportion to the total length of the channel, nor the circumstance that the lands granted were all dry at the time of the grant. It may be mentioned that for this purpose, as indicated in the *Swamigal case*[7], the fact that the inam village lay outside and not inside zemin limits is hardly relevant. Another point touched upon in the first of the decisions under review concerns the measure and limits of the right of user of water. In the *Urlam case*[8], in the case of zemins, it was stated that the right is measured by the physical conditions of the channel as they were at the time of the permanent settlement. The *Swamigal case*[7] holds the rule to be applicable to inam villages. Sir George Rankin there observed: "When it is said that the inamdar's or zemindar's right to water is measured by the physical conditions at the channel heads, it is not of course intended that at all seasons he is entitled to a volume of

1. (1937) 2 M.L.J. 178.
2. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 559.
3. (1912) 24 M.L.J. 30.
4. (1919) 37 M.L.J. 42, 45: L.R. 46 I.A. 123: I.L.R. 43 Mad. 166 (P.C.).
5. (1933) 67 M.L.J. 544: I.L.R. 57 Mad. 460.
6. (1927) 53 M.L.J. 769, 785.
7. (1942) 2 M.L.J. 367: L.R. 69 I.A. 22: I.L.R. (1942) Mad. 893 (P.C.).
8. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).

water amounting to the full capacity of the channels. It is only meant that up to the measure of that capacity he is entitled to such water as can flow into them, the condition of the 'river' or 'upper channel' being what it is from time to time." Both the decisions also fully recognise that the right is not in any way affected by the extent of wet land under cultivation at the time of the settlement or grant and that a thrifty user of the water resulting in extended cultivation will not afford cause for the imposition of a levy under the provisions of the Madras Irrigation Cess Act. The first of the decisions under notice reiterates this view.

SUBBARAMI REDDY *v.* CHENCHURAGHAVA REDDY, (1945) 1 M.L.J. 151.

An interesting question of Hindu law fell to be settled in this case which lays down that a grandfather in separating himself from his grandsons has no authority to compel a severance as between the grandsons *inter se*. While conceding that in similar circumstances a father can bring about a division as between his sons, it is stated that the grandfather's position *vis a vis* his grandsons is different. The basis of the decision is that while a father is the natural guardian of his sons and therefore can affect their status, a grandfather is not a natural guardian of his grandsons and unless appointed by the Court cannot act as guardian at all. It may, with respect, be pointed out that the question admits of a fuller discussion. The doctrine of unilateral declaration by which it is competent to a member of a Mitakshara joint family to separate himself has brought in its wake the corollary that there is no presumption that when one member separates himself from the rest the latter remain joint. It is true the other members may remain joint but that is stated to be a question of intention which must no doubt be proved, see *Ram Narain Sahu* v. *Mt. Makhna*[1]. There is no limitation that the principle operates only when the remaining coparceners are adults or that it applies only as between the several branches alone and not within a branch. May it not therefore be plausibly argued that when a grandfather separates himself from his grandsons there is in law a severance between the grandsons also and that where they are minors there can be no manifestation of an intention on their part to continue united?

Be that as it may, early authorities seem to suggest that the father's power to impose a partition among his sons *inter se* does not rest on any theory of guardianship. For one thing the theory will not fit in where the sons are adults. It cannot work where effecting a partition between the sons may not be in their interests. It will be inconsistent with the principle of independent representation for minors as regards their interests where such interests collide either with those of the father or where as between themselves their interests may not be identical. The explanation of the father's power has therefore to be sought elsewhere. The Mitakshara lays down[2]: "When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two or more sons." Balambhatta's comment is: "He may make them distinct and several by giving to them shares of the inheritance." The further statement in the Mitakshara[3] that the father may separate the eldest with the best share, the middlemost with a middle share and the youngest with the worst share shows that the father's power is not restricted to the ascertainment of his own share but that it extends also to the allotment of shares to his sons. The Smriti Chandrika also has recognised the father's power.[4] In *Kandaswami* v. *Doraiswami Aiyar*,[5] Muttuswami Ayyar, J. observed: ". . that according to the Hindu law a partition made by the father is binding on the sons not only in respect of the father's share, but also of their own shares provided that it is made subject to the restriction mentioned in the Hindu Law and that it becomes obligatory *by will of the father* as regulated and restrained by the law irrespective of the consent of sons." In regard to the basis of the power the learned Judge observes: "This power of distribution is . . . . an incident, not of ownership, but of paternal power though that power must be exercised without partiality and within the limits fixed

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1. (1939) 2 M.L.J. 569 : I.L.R. (1939) All. 680 (P.C.).
2. Ch. I, s. 2, vol. 2.
3. Ch. II, s. 2, para 3.
4. Ch. II, s. 1, para 3.
5. (1880) I.L.R. 2 Mad. 317.

by the law." The decision in this case has been followed in a number of cases, see *Visalakshi Ammal* v. *Sivaramien*[1], *Roop Lal* v. *Lakshmi Doss*[2], *Singa Iyer* v. *Venkatarama Iyer*,[3] *Murugayya Maniyakaran* v. *Palaniyandi Maniyakaran*[4], *Ganpat* v. *Gopal Rao*.[5] That the father's power takes root in the ancient doctrine of *patria potestas* is consistent with the texts equating a wife, a slave and a son in regard to their incapacity to own property independently and the texts of Manu and Vasishta as to the source of the parental power to give the son in adoption. If the father's power to impose partition is attributable to his potestas, by parity of reasoning a similar power would be available to the grandfather. In the domain of property law the son, grandson and the great-grandson have been treated alike for various purposes. This line of argument is no doubt open to the criticism that, if correct, it should give the grandfather also a right to give away his grandson in adoption. It may, however, be answered by saying that even if the power is not found in one direction it does not mean that the analogy fails in other directions also.

It has been stated in the case under notice that the ruling in *Aiyavier* v. *Subramania Aiyar*[6], does not show that in that case the grandfather had not merely separated himself but separated the grandsons also *inter se*. The facts are by no means clear. The observation of Oldfield, J. : "I find no difficulty in holding that the settlor's intention was to make a partition, the reference to plaintiffs' incapacity having no effect, except that their shares were vested during its continuance in first defendant for their benefit."—seems, however, to suggest that there was such a severance; otherwise the reference to their *shares* may not strictly be correct. *Lakshmibai* v. *Ganpat Moroba*[7] is another decision which is of somewhat dubious assistance in regard to the present question. While West and Buhler have read the decision as suggesting that the grandfather has the power to effect a severance of status not merely as between him and his grandsons but also as between the latter *inter se* and have recorded their dissent from that view, Mayne regards the case as not postulating any such conclusion. In that case a person made testamentary dispositions in regard to property which had fallen to his share on a partition between himself and his brother. The testator had sons and grandsons. After the testator's death the dispositions under the will were acted upon; a commissioner was appointed and the properties were divided and allotted to each of the sons and grandsons, the latter being minors; and after attainment of majority the minors had in a measure acquiesced in what had happened. In a suit thereafter impeaching the validity of the will and its dispositions, the learned Judge in affirming the arrangements that had been made and acted upon, observed: "Here the testator . . . though undoubtedly dealing with his share of the property partitioned in 1823 as separate, and not as joint family property, has not . . . at all exceeded the powers which according to a long current of uncontested decisions and by law vested in a Hindu, when disposing by will of his separate property. He has excluded none who by the ordinary course of descent would have had any right to inherit and he has divided his residuary estate into three equal shares giving one of such shares to each of his two then surviving sons and the remaining third in equal portions to the four sons of the only one amongst his own deceased sons who left male issue." The learned Judge had also held that the testator could competently dispose of by will property taken by him on partition, though he had sons and grandsons. The observations of the trial Judge coupled with the dismissal of the suit, agreed in by the appellate Court, would suggest that according to the Judges there was no objection in law to the grandfather's effecting a severance between the grandsons *inter se*. The decision under notice has at any rate swept away a power whose existence could be justified only on antiquated and anachronistic doctrines, at any rate, as regards the grandfather *vis a vis* his grandsons.

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1. (1904) 14 M.L.J. 310: I.L.R. 27 Mad. 577.
2. (1905) I.L.R. 29 Mad. 1.
3. (1913) 23 I.C. 6.
4. (1916) 31 M.L.J. 147.
5. (1899) I.L.R. 23 Bom. 636.
6. (1917) 32 M.L.J. 439.
7. (1867) 4 Bom.H.C.R. 150.

Chandrasekhara Aiyar and Rajamannar, JJ. Official Receiver, Vizagapatam, *v.* Suryanarayana.
29*th October*, 1945. Ap. Nos. 55, etc. of 1944.

Provincial Insolvency Act (V of 1920), *section* 20—Interim *receiver appointed under—Power to maintain suit to recover possession of property of insolvents which has passed into the hands of third party—Insolvency Court if can confer.*

There is nothing in the Provincial Insolvency Act which prevents the Insolvency Court from according sanction to an *interim* receiver appointed under section 20 of the Provincial Insolvency Act to institute suits even against third parties for the vindication of the rights of the debtors in respect of whom an Insolvency Petition is pending. The *interim* receiver in insolvency has such of the powers conferrable on a receiver appointed under the Code of Civil Procedure as the Court may direct.

B. V. Ramanarasu for *V. Govindarajachari* and *V. V. Raghavan* for Appellant.

B. Jagannadhadas, C. V. Dikshitulu, Kasturi Seshagiri Row, D. V. Reddi Pantulu and *N. K. Vinayakam* for Respondents.

K.S.

Chandrasekhara Aiyar, J. Chathu Nayar *v.* Janaki Amma.
2nd *November*, 1945. A. A. O. No. 493 of 1944.

Malabar Compensation for Tenants Improvements Act (I of 1900)—*Decree for redemption of kanom—Purchase by another in sale in execution of decree against the holder of redemption decree—Execution by such purchaser—Objection to validity of sale of decree—Sustainability—Madras Civil Rules of Practice, Rule* 178—*Scope—Deposit of kanom amount and value of improvements—Not a condition precedent to execution—Future rent till surrender of possession—Right to—Set off against value of improvements—Permissibility—Civil Procedure Code (V of* 1908), *Order* 20, *rule* 12—*If abrogated by Malabar Compensation for Tenants Improvements Act.*

A decree for redemption of a kanom was passed on 29th June 1923 in favour of the melcharthdar and determined the amounts due to the several defendants as value of improvements. The decree directed that on the plaintiff paying into Court the kanom amount and the value of the improvements less certain damages payable by the second defendant and future rent until surrender, the defendants should give up possession of the property to the plaintiff. The decree was attached and purchased in the sale in execution by a creditor of the decree-holder and the purchaser sought to execute the decree.

Held: (1) Though Rule 178 of the Civil Rules of Practice (Madras) says that no decree shall be ordered to be sold in execution of another decree, when such a sale takes place, without any objection being raised by the judgment-debtor, the sale cannot be held to be void or inoperative. 34 Mad. 442 relied on.

(2) The deposit of the kanom amount and the value of the improvements is not a condition precedent to the execution of the redemption decree. It is sufficient if the amount is paid before the properties are surrendered.

(3) The tenant is entitled to set off against the value of improvements due to him the future rents till the actual date of surrender of possession in a case coming under the Malabar Compensation for Tenants Improvements Act. The jurisdiction to award future rent can be exercised not only at the time of passing the decree but also later in the course of execution. It cannot be said in such a case that the provisions of Order 20, rule 12 of the Code of Civil Procedure apply to bar recovery of future rent for any period over 3 years.

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Kuppuswami Aiyar, J. Lakshmiah, *In re.*
9*th November*, 1945. Cr.R.C. No. 644 of 1945.
(Cr.R.P. No. 602 of 1945).

Madras Motor Vehicles Rules—Rule 220—"*Loitering*"—*Gist of offence—Waiting before hotel to pick up passengers—Offence.*

It cannot be said that the offence under rule 220 of the Motor Vehicles Rules requires that the delay must be of such a character as to prevent the bus from reaching the destination in time. What is made an offence under the rule is loitering on the road. Where it is found that the driver was stopping his bus in front of a hotel so that he might pick up some passengers from there it amounts to "lingering on the way". Waiting for passangers who had gone to the hotel at a place which is not a stopping place for nearly ten or fifteen minutes is certainly lingering on the way so as to make the driver guilty under rule 220 of the Motor Vehicles Rules.

K. Kalyanasundaram and *R. Santanam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.
NRC

Chandrasekhara Aiyar, J. Ramappa and others, In *re.*
12th November, 1945. C.M.P. No. 5402 of 1945.

Civil Procedure Code (V of 1908), *Order* 41-A (*Madras*) *rules* 1 *and* 2—*Provision for production of printed copies of judgment—If mandatory—Power of Court to dispense with production of requisite number of printed copies of judgment appealed against.*

The Court has power to dispense with the production of the twelve printed copies of the judgment appealed against so long as a certified copy of the judgment is there. Order 41-A rule 1 (Madras) is only a modification to the rules contained in Order 41, rule 1 of the Civil Procedure Code. The power to dispense with the production of copies of judgment contained in Order 41, rule 1 of the Civil Procedure Code is not taken away but continues. (1945) 1 M.L.J. 268, dissented from.

A. Bhujanga Rao and *D. R. Krishna Rao* for Petitioner.

K.S.

Chandrasekhara Aiyar, J. Marideyya *In re.*
16th November, 1945. Cr.R.C. No. 820 of 1945.
(Case Refd. No. 44 of 1945).

Criminal Procedure Code (V of 1898), *section* 397—*Sentence of imprisonment—If can be postponed so as to take effect after the sentence for default in furnishing security.*

Under section 397 of the Criminal Procedure Code a sentence passed on conviction should commence immediately and cannot be postponed so as to take effect after the sentence for default in furnishing security.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Rangaraju, *In re.*
23rd November, 1945. Crl. R.C. No. 552 of 1945.

Madras Abkari Act (I of 1886) *section* 56-*B*—*Mere opening of depot after hours permirtted by license without effecting sales—If offence.*

Where a condition in a license to a toddy depot keeper permitted him to keep open his depot till 6 P.M. only, the mere opening of the shop after that hour will not constitute an offence of breach of the condition in the absence of proof either direct or circumstancial that toddy was sold after the hour specified in the license.

T. R. Venkataraman for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth and *Rajamannar, JJ.* Shanmugasundaram Pillai *v.* Muthukumaraswami Pillai.
26th November, 1945. Appeal No. 409 of 1944.

Provincial Insolvency Act (V of 1920), *section* 53—*Partition between Hindu insolvent and sons attacked as sham, colourable and not intended to be given effect to, but to be kept as a secret weapon against the creditors—Representative suit by creditors attacking the partition—Nature of relief that can be given.*

Where on the adjudication as insolvent of a Hindu father, the creditors with the leave of the insolvency Court filed a representative suit challenging that a partition between the insolvent and his sons was a sham and colourable transaction not intended to be given effect to as between themselves but to be kept as a secret weapon against the creditors,

Held, Whether the partition deed be a sham transaction or whether it be valid so far as it effects a severance of status but fraudulent in that it makes unequal allotment of the available assests and debts with a view to defeat the creditors, the remedy of the creditors, is not to ask for a re-partition, but to ask for a declaration regarding the nature of the transaction and its validity *vis a vis* the creditors.

If it is a mere colourable partition not meant to operate between the parties it can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint. But if it is a fraudulent allotment of shares to defeat the creditors, the latter can avoid the partition under section 53 of the Provincial Insolvency Act and proceed against what would be the insolvent's proper share ignoring the allotment of the properties at the partition.

(1944) 1 M.L.J. 384 and 54 M.L.J. 726, referred to.

K. P. Ramakrishan Aiyar, R. Viswanathan and *T. R. Srinivasan* for Appellant.

K. S. Desikan and *K. Raman* for Respondent.

K.S.

Wadsworth and Rajamannar, JJ. Jainambukanni Ammal *v.* Ruthrapathi Pillai.
7th November, 1945. Appeal No. 414 of 1944.

Civil Procedure Code (*V of* 1908), *section* 92—*Charity whether true beneficiary or entitled only to a charge for its performance—Test—Property endowed and temple situate in British India and income to be applied abroad —Suit under section* 92, *Code of Civil Procedure* (*V of* 1908), *in respect of such properties—Jurisdiction of British Indian Court.*

A settlement deed was in the following terms :—I have made the following arrangement in respect of the property specified hereunder which was acquired by me out of my own earnings, and which has been in my enjoyment with miras for the salvation of my soul. Out of the funds of the aforesaid property *Thannirpandal* (water-shed) charity shall be conducted for seven days on the occasion of the Masi Makham festival of Sri Souriraja Perumal at Tirukannapuram. During the Makham festival day, 100 persons shall be fed and the charity conducted. Out of the income derived from the aforesaid land, excluding the Government kist, etc. and expenses in connection with the charity the remaining income shall be utilised for the maintenance of my sons who have come from the east, *viz.*, (1) *S* and (2) *N* and (3) my wife *T*. The aforesaid charity and the aforesaid property shall be managed by my eldest son-in-law *G*. After the said *G* the aforesaid charity and the said family shall be managed by his nominee.

G obtained a release from the sons *S* and *N* and executed a will treating the property as absolutely his own, subject to an obligation to conduct the charity making provision for payment of maintenance to members of his family and making his son *M* the trustee of the charity after him. After *G's* death *M* became trustee in accordance with the will but sold the property to various people.

In a suit under section 92 of the Code of Civil Procedure for removal of the trustee, setting aside the alienations and framing of a scheme in respect of the charity,

Held : (1) reading the settlement deed as a whole there was no gift of the surplus income or the property to the sons or members of the family generally.

(2) The charity itself is the true beneficiary and *G* should be considered to be a trustee of the charity and the only obligation of the trustee for the time being was to utilise the surplus income, if any, for the maintenance of the three specified relatives after whose death or effacement otherwise, there would be no obligation on the trustee to utilise any part of the income of the property for any object other than the charitable object mentioned in the document.

(3) *M* as trustee was not entitled to alienate the properties which belonged to the trust, as in the absence of any necessity of the charity the alienations will not be binding on the charity.

(4) The Temple of Sri Souriraja Perumal being at Tirukannapuram which is admittedly in British India the fact that on Masi Makham day, the deity is taken to the beach in Tirumalarayanpatnam which is in French territory cannot deprive the British Indian Court of jurisdiction to entertain the scheme suit. The temple as well as the property being in British India no relief in respect of the property can be obtained except from a British Indian Court.

(1944) 1 M.L.J. 466 (P.C.), distinguished.

L. R. 2 Ch. Appeals 356, relied on.

S. Tyagaraja Aiyar for Appellants.

C. A. Seshagiri Sastri and *K. Muthuswami Chettiar* for Respondents.

K.S.

Rajamannar, J. Samanthaka Nadar *v.* James.
9th November, 1945. S. A. No. 1627 of 1944.

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 9—*Scope—Suit on behalf of minor dismissed—Gross negligence of the guardian—Effect on bar under Order* 9, *rule* 9, *to fresh suit for same relief.*

Where a suit filed on behalf of a minor was dismissed and it is found that the guardian of the minor had been grossly negligent at the time of the suit, the minor is not debarred from filing another suit for the same relief. The statutory bar under Order 9, rule 9 of the Code of Civil Procedure can be surmounted by proof of gross negligence of the minor's guardian in the prior suit.

[Leave granted.]

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

A. Swaminatha Aiyar for Respondent.

K.S.

Bell, J. Viswanatha Iyer *v.* Sankaranarayana Iyer.
19th November, 1945. A. A. A. O. No. 295 of 1944.

Transfer of Property Act (*IV of* 1882), *section* 39—*Hindu widow's claim to maintenance—Absence of any charge created for maintenance—Widow cannot enforce claim against the alienee.*

A claim by a Hindu widow for maintenance unsupported by a charge forms no encumbrance whatsoever on the property. There must be something in the nature of a charge before property which passes to a creditor or other alienee goes to him encumbered with the maintenance of a widow. There is no trust either in respect of such property which will enable her to follow it as trust property.

[Authorities discussed].

P. R. Ramakrishna Aiyar and *C. K. Viswanatha Aiyar* for Appellant.

C. S. Swaminathan for Respondent.

K.S.

NRC

Wadsworth and Rajamannar, JJ. Yanadamma *v.* Venkateswarulu.
20th November, 1945. Appeal No. 534 of 1944.

Registration Act (*XVI of* 1908, *as amended in* 1929), *section* 17 (2) (*v*)—*Award of arbitrators—When falls under exception—Test.*

When there is a dispute between parties and that dispute is referred to arbitrators whose decision the parties agree to accept, there is, in fact, a contract between these parties, the final terms of which will embody the decision of the arbitrators on the point referred to them. If the nature of the contract between the parties is such that it actually declares or creates or assigns any interest in immoveable property, the award just like any other contract having that effect, must be registered. If, however, the contract between the parties merely relates to the terms on which one party shall have the right to demand from the other party a future conveyance of property, then the award which settles the terms upon which this future conveyance should be made, is nothing more than part of an agreement to convey in future which falls under the exception in section 17 (2) (*v*) of the Registration Act.

Where the dispute was as to the quantum of property to be assigned in lieu of maintenance and the decision of the arbitrators settled this, the award confers only a right on one party to require the other to convey the property selected by the arbitrators and does not require to be registered.

V. Subramaniam for Appellants.

K. Kotayya and *K. Ramamurti* for Respondents.

K.S.

Bell, J. Chunilal Sowcar *v.* Srinivasa Rao.
21st November, 1945. C. R. P. No. 921 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 79—*Madras High Court Rules under—Rule* 21 (3)—*Amendment of* 29*th February*, 1944—*If retrospective.*

The amendment of 29th February, 1944, to rule 21, sub-rule 3 of the Rules framed under section 79 of the Provincial Insolvency Act making it necessary that notices of the date fixed for the hearing of an insolvency petition must be served not only on the creditors and the debtor but on any transferee, the transfer in whose favour is alleged to be an act of insolvency, is not retrospective. The fact that the amendment came into force during the pendency of an appeal in which on the basis of the amended rule an alienee applied to be impleaded as a party, is no ground for re-opening the order of adjudication in the Insolvency Court in which the alienee was not given notice as the rule as it stood then did not require such notice. [Authorities discussed.]

K. Sankara Sastri for Petitioner.

T. C. A. Bhashyam, T. C. A. Tirumalachari and *Venkatavaradachari*, for Respondent.

K.S.

Koman, J. Venkata Narapu Reddi *v.* Chinna Konda Reddi.
23rd November, 1945. S. A. No. 2081 of 1944.

Deed—Sarikoru *document—Nature of—Mortgage or lease—Test.*

A document called *sarikoru* document recited that for discharging the debts due and for meeting family expenses, the executant borrowed Rs. 5,000 and for discharging the amount so borrowed, the lands mentioned in the schedule to the document were being conveyed to the promisee. It further recited that the executant would see to it that the lands would be continued in favour of the promisee until the above amount was discharged. In a suit for redemption of the land the promisee's successor in title contended that the deed was a lease and no suit for redemption would therefore lie.

Held, that the deed was a mortgage and not a lease.

Authorities reviewed and decision of Wadsworth, J., in S. A. No. 813 of 1936 relied on.

[Leave to appeal was granted.]

K. Subba Rao and *P. Rami Reddi* for Appellant.

V. Govindarajachari for Respondent.

K.S.

Kuppuswami Ayyar, J. Gomathinayagam Pillai, *In re.*
26th November, 1945. Cr. A. No. 584 of 1945.

Indian Penal Code (*XLV of* 1860), *section* 120-B—*Conspiracy to do an illegal act which is a crime—Mere agreement will be an offence without any act done in pursuance of the agreement.*

When a conspiracy is to do an illegal act which is a crime, then the agreement by itself will be sufficient to constitute an offence : it is only when the illegal act is no crime there will be the necessity for an act to be done in pursuance of the agreement to constitute an offence. Accordingly a mere conspiracy to set fire to Government buildings, police stations, public offices, etc., constitutes a crime and there is no necessity to prove any act done in pursuance of the agreement.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

[END OF VOLUME.]